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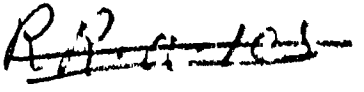
THE AMERICAN COMMONWEALTH



THE AMERICAN COMMONWEALTH

BY

JAMES BRYCE,

AUTHOR OF 'THE HOLY ROMAN EMPIRE'

M.P. FOR ABERDEEN

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B. 3167.

IN THREE VOLUMES

VOL. I

THE NATIONAL GOVERNMENT

37. 6. 4.

London

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1888

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To my Friends and Colleagues

ALBERT VENN DICEY

THOMAS ERSKINE HOLLAND

PREFACE

As the introductory chapter of this work contains such explanations as seem needed of its scope and plan, the Author has little to do in this place except express his thanks to the numerous friends who have helped him with facts, opinions, and criticisms, or by the gift of books or pamphlets. Among these he is especially indebted to the Hon. Thomas M. Cooley, now Chairman of the Inter-State Commerce Commission in Washington; Mr. James B. Thayer of the Harvard Law School, Cambridge, Mass.; Hon. Seth Low, formerly Mayor of Brooklyn; Mr. Theodore Roosevelt of New York; Mr. G. Bradford of Cambridge, Mass.; and Mr. Theodore Bacon of Rochester, N.Y.; by one or other of whom the greater part of the proofs of these volumes have been read. He has also received valuable aid from Mr. Justice Holmes of the Supreme Court of Massachusetts; Mr. Theodore Dwight, late Librarian of the State Department at Washington; Mr. H. Villard of New York; Dr. Albert Shaw of Minneapolis; Mr. Jesse Macy of Grinnell, Ia.; Mr. Simeon Baldwin and Dr. George P. Fisher of New-haven, Conn.; Mr. Henry C. Lea of Philadelphia; Col.

T. W. Higginson of Cambridge, Mass.; Mr. Bernard Moses of Berkeley, Cal.; Mr. A. B. Houghton of Corning, N.Y.; Mr. John Hay of Washington; Mr. Henry Hitchcock of St. Louis, Mo.; President James B. Angell of Ann Arbor, Mich.; Hon. Andrew D. White of Syracuse, N.Y.; Mr. Frank J. Goodnow of New York; Dr. Atherton of the State College, Pennsylvania; and the U.S. Bureau of Education. No one of these gentlemen is, however, responsible for any of the facts stated or views expressed in the book.

The Author is further indebted to Mr. Low and Mr. Goodnow for two chapters which they have written, and which contain, as he believes, matter of much interest relating to municipal government and politics.

He gladly takes this opportunity of thanking for their aid and counsel four English friends: Mr. Henry Sidgwick, who has read most of the proofs with great care and made valuable suggestions upon them; the Rev. Stopford A. Brooke, whose literary criticisms have been very helpful; Mr. Albert V. Dicey, and Mr. W. Robertson Smith.

He is aware that, notwithstanding the assistance rendered by friends in America, he must have fallen into not a few errors, and without asking to be excused for these, he desires to plead in extenuation that the book has been written under the constant pressure of public duties as well as of other private work, and that the difficulty of obtaining in Europe correct information regarding the constitutions and laws of American States and the rules of party organizations is very great.

When the book was begun, it was intended to contain a study of the more salient social and intellectual phenomena of contemporary America, together with descriptions of the scenery and the aspects of nature and human nature in the West, all of whose States and Territories the Author has visited. But as the work advanced, he found that to carry out this plan it would be necessary either unduly to curtail the account of the government and politics of the United States, or else to extend the book to a still greater length than that which, much to his regret, it has now reached. He therefore reluctantly abandoned the hope of describing in these volumes the scenery and life of the West. As regards the non-political topics which were to have been dealt with, he has selected for discussion in the concluding chapters those of them which either were comparatively unfamiliar to European readers, or seemed specially calculated to throw light on the political life of the country, and to complete the picture which he has sought to draw of the American Commonwealth as a whole.

October 22, 1888.

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LIST OF PRESIDENTS

1789–1793	George Washington.
1793–1797	Re-elected.
1797–1801	John Adams.
1801–1805	Thomas Jefferson.
1805–1809	Re-elected.
1809–1813	James Madison.
1813–1817	Re-elected.
1817–1821	James Monroe.
1821–1825	Re-elected.
1825–1829	John Quincy Adams.
1829–1833	Andrew Jackson.
1833–1837	Re-elected.
1837–1841	Martin van Buren.
1841–1845	William Henry Harrison (died 1841).
	John Tyler.
1845–1849	James K. Polk.
1849–1853	Zachary Taylor (died 1850).
	Millard Fillmore.
1853–1857	Franklin Pierce.
1857–1861	James Buchanan.
1861–1865	Abraham Lincoln.
1865–1869	Re-elected (died 1865).
	Andrew Johnson.
1869–1873	Ulysses S. Grant.
1873–1877	Re-elected.
1877–1881	Rutherford B. Hayes.
1881–1885	James Abram Garfield (died 1881).
	Chester A. Arthur.
1885–1889	Stephen Grover Cleveland.

AREA, POPULATION, AND DATE OF ADMISSION OF THE STATES

THE THIRTEEN ORIGINAL STATES, IN THE ORDER IN WHICH THEY RATIFIED THE CONSTITUTION.

	Ratified the Constitution.	Area in square miles.[1]	Population (1880).
Delaware	1787	1,960	146,608
Pennsylvania	1787	44,985	4,282,891
New Jersey	1787	7,455	1,131,116
Georgia	1788	58,980	1,542,180
Connecticut	1788	4,845	622,700
Massachusetts	1788	8,040	1,783,085
Maryland	1788	9,860	934,943
South Carolina	1788	30,170	995,577
New Hampshire	1788	9,005	346,991
Virginia	1788	40,125	1,512,565
New York	1788	47,620	5,082,871
North Carolina	1789	48,580	1,399,750
Rhode Island	1790	1,085	276,531

STATES SUBSEQUENTLY ADMITTED, IN THE ORDER OF THEIR ADMISSION.

Vermont	1791	9,135	332,286
Kentucky	1792	40,000	1,648,690
Tennessee	1796	41,750	1,542,359
Ohio	1802	40,760	3,198,062
Louisiana	1812	45,420	939,946
Indiana	1816	35,910	1,978,301
Mississippi	1817	46,340	1,131,597
Illinois	1818	56,000	3,077,871
Alabama	1819	51,540	1,262,505
Maine	1820	29,895	648,936
Missouri	1821	68,735	2,168,380
Arkansas	1836	53,045	802,525

[1] According to census returns of 1880.

	Ratified the Constitution.	Area in square miles.	Population (1880).
Michigan	1837	57,430	1,636,937
Florida	1845	54,240	269,493
Texas	1845	262,290	1,591,749
Iowa	1846	55,475	1,624,615
Wisconsin	1848	54,450	1,315,497
California	1850	155,980	864,694
Minnesota	1858	79,205	780,773
Oregon	1859	94,560	174,768
Kansas	1861	81,700	996,096
W. Virginia	1863	24,645	618,457
Nevada	1864	109,740	62,266
Nebraska	1867	76,185	452,402
Colorado	1876	103,645	194,327

THE TERRITORIES

	Area.	Population in 1880.
Dakota	147,700	135,177
Wyoming	97,575	20,789
Montana	145,310	39,159
Idaho	84,290	32,610
Washington	66,880	75,116
Utah	82,190	143,963
New Mexico	122,460	119,565
Arizona	112,920	40,440

(*The population of Dakota and Washington has enormously increased since* 1880.)

Dates of some Remarkable Events in the History of the North American Colonies and United States.

1606	First Charter of Virginia.
1607	First Settlement in Virginia.
1620	First Settlement in Massachusetts.
1664	Taking of New Amsterdam (New York).
1759	Battle of Heights of Abraham and taking of Quebec.
1775	Beginning of the Revolutionary War.
1776	Declaration of Independence.
1781	Formation of the Confederation.
1783	Independence of United States recognized.
1787	Constitutional Convention at Philadelphia.
1788	The Constitution ratified by Nine States.
1789	Beginning of the Federal Government.
1793	Invention of the Cotton Gin.
1803	Purchase of Louisiana from France.
1812–14	War with England.
1812–15	Disappearance of the Federalist Party.
1819	Purchase of Florida from Spain.
1819	Steamers begin to cross the Atlantic.
1820	The Missouri Compromise.
1828–32	Formation of the Whig Party.
1830	First Passenger Railway opened.
1840	National Nominating Conventions regularly established.
1844	First Electric Telegraph in operation.
1845	Admission of Texas to the Union.
1846–48	Mexican War and Cession of California.
1852–56	Fall of the Whig Party.
1854–56	Formation of the Republican Party.
1857	Dred Scott decision delivered.
1861–65	War of Secession.
1869	First Trans-Continental Railway completed.
1877	Final withdrawal of Federal troops from the South.
1879	Specie Payments resumed.

A MAP TO ILLUSTRATE THE
GROWTH OF THE UNITED STATES
Scale of English Miles
Longitude West of Greenwich
Stanford's Geog.l Estab.t
DOMINION OF CANADA
MEXICO
FRENCH CESSION
FIRST MEXICAN CESSION 1848
OR PROVINCE OF
LOUISIANA 1803
TEXAS CESSION 1850
TEXAN ANNEXATION 1845
SECOND MEXICAN CESSION
ORCADSDEN PURCHASE 1853
WASHINGTON
OREGON
IDAHO
MONTANA
WYOMING
DAKOTA
NEBRASKA
IOWA
MINNESOTA
WISCONSIN
MICHIGAN
ILLINOIS
INDIANA
OHIO
KENTUCKY
TENNESSEE
MISSOURI
KANSAS
COLORADO
NEVADA
UTAH
CALIFORNIA
ARIZONA
NEW MEXICO
TEXAS
ARKANSAS
MISSISSIPPI
ALABAMA
LOUISIANA
FLORIDA
GEORGIA
SOUTH CAROLINA
NORTH CAROLINA
VIRGINIA
WEST VIRGINIA
PENNSYLVANIA
NEW YORK
MAINE
Columbia R.
Snake R.
Yellowstone R.
Platte R.
Missouri R.
Mississippi R.
Red R.
Arkansas R.
Colorado R.
Rio Grande del Norte
Ohio R.
Savannah R.
Lawrence R.
L. Superior
L. Michigan
L. Huron
L. Erie
L. Ontario
Montgomery
Albany
Boston
New York
Philadelphia
Baltimore
Richmond
Norfolk
Charleston
Savannah
Orleans
St. Louis
Milwaukee
Chicago
Detroit
Cleveland
Cincinnati
Louisville
Pittsburgh
Washington
San Francisco
ALASKA
Scale of Miles
Original Area of the U. States in 1776
Area of the Original thirteen States
Boundaries of the Original thirteen States, shown in Red lines
Tinted Pink
Red
London: Macmillan & Co.
The names of the Territories are given in sloping capitals. The date of admission is placed after the name of every State except the original thirteen.

CHAPTER I

INTRODUCTORY

"WHAT do you think of our institutions?" is the question addressed to the European traveller in the United States by every chance acquaintance. The traveller finds the question natural, for if he be an observant man his own mind is full of these institutions. But he asks himself why it should be in America only that he is so interrogated. In England one does not inquire from foreigners, nor even from Americans, their views on the English laws and government; nor does the Englishman on the Continent find Frenchmen or Germans or Italians anxious to have his judgment on their politics. Presently the reason of the difference appears. The institutions of the United States are deemed by inhabitants and admitted by strangers to be a matter of more general interest than those of the not less famous nations of the Old World. They are, or are supposed to be, institutions of a new type. They form, or are supposed to form, a symmetrical whole, capable of being studied and judged all together more profitably than the less perfectly harmonized institutions of older countries. They represent an experiment in the rule of the multitude, tried on a scale unprecedentedly vast, and the results of which every one is concerned to watch.

And yet they are something more than an experiment, for they are believed to disclose and display the type of institutions towards which, as by a law of fate, the rest of civilized mankind are forced to move, some with swifter, others with slower, but all with unresting feet.

When our traveller returns home he is again interrogated by the more intelligently curious of his friends. But what now strikes him is the inaptness of their questions. Thoughtful Europeans have begun to realize, whether with satisfaction or regret, the enormous and daily-increasing influence of the United States, and the splendour of the part reserved for them in the development of civilization. But such men, unless they have themselves crossed the Atlantic, have seldom either exact or correct ideas regarding the phenomena of the New World. The social and political experiments of America constantly cited in Europe both as patterns and as warnings are hardly ever cited with due knowledge of the facts, much less with comprehension of what they teach; and where premises are misunderstood inferences must be unsound.

It is such a feeling as this, a sense of the immense curiosity of Europe regarding the social and political life of America, and of the incomparable significance of American experience, that has led and will lead so many travellers to record their impressions of the Land of the Future. Yet the very abundance of descriptions in existence seems to require the author of another to justify himself for adding it to the list.

I might plead that America changes so fast that every few years a new crop of books is needed to describe the new face which things have put on, the new problems that have appeared, the new ideas germinating among her people, the new and unexpected develop-

ments for evil as well as for good of which her established institutions have been found capable. I might observe that a new generation grows up every few years in Europe, which does not read the older books, because they are old, but may desire to read a new one. And if a further reason is asked for, let it be found in this, that during the last fifty years no author has proposed to himself the aim of portraying the whole political system of the country in its practice as well as its theory, of explaining not only the National Government but the State Governments, not only the Constitution but the party system, not only the party system but the ideas, temper, habits of the sovereign people. Much that is valuable has been written on particular parts or aspects of the subject, but no one seems to have tried to deal with it as a whole; not to add that some of the ablest writers have been either advocates, often professed advocates, or detractors of democracy.

To present such a general view of the United States both as a Government and as a Nation is the aim of the present book. But in seeking to be comprehensive it does not attempt to be exhaustive. The effort to cover the whole ground with equal minuteness, which a penetrating critic—the late Karl Hillebrand—remarked upon as a characteristic fault of English writers, is to be avoided not merely because it wearies a reader, but because it leads the writer to descant as fully upon matters he knows imperfectly as upon those with which his own tastes and knowledge qualify him to deal. I shall endeavour to omit nothing which seems necessary to make the political life and the national character and tendencies of the Americans intelligible to Europeans, and with this view shall touch upon some topics only distantly connected with government or politics. But

there are also many topics, perhaps no more remote from the main subject, which I shall pass lightly over, either because they have been sufficiently handled by previous writers, or because I have no such minute acquaintance with them as would make my observations profitable. For instance, the common-school system of the United States has been so frequently and fully described in many easily accessible books that an account of it will not be expected from me. But American universities have been generally neglected by European observers, and may therefore properly claim some pages. The statistics of manufactures, agriculture, and commerce, the systems of railway finance and railway management, are full of interest, but they would need so much space to be properly set forth and commented on that it would be impossible to bring them within the present volumes, even had I the special skill and knowledge needed to distil from rows of figures the refined spirit of instruction. Moreover, although an account of these facts might be made to illustrate the features of American civilization, it is not necessary to a comprehension of American character. Observations on the state of literature and religion are necessary, and I have therefore endeavoured to convey some idea of the literary tastes and the religious habits of the people, and of the part which these play in forming and colouring the whole life of the country.

The book which it might seem natural for me to take as a model is the *Democracy in America* of Alexis de Tocqueville. It would indeed, apart from the danger of provoking a comparison with such an admirable master of style, have been an interesting and useful task to tread in his steps, and seek to do for the United States of 1888, with their sixty millions of people, what

he did for the fifteen millions of 1832. But what I have actually tried to accomplish is something different, for I have conceived the subject upon quite other lines. To De Tocqueville America was primarily a democracy, the ideal democracy, fraught with lessons for Europe, and above all for his own France. What he has given us is not so much a description of the country and people as a treatise, full of exquisite observation and elevated thinking, upon democracy, a treatise whose conclusions are illustrated from America, but are in large measure founded, not so much on an analysis of American phenomena, as on general views of democracy which the circumstances of France had suggested. Democratic government seems to me, with all deference to his high authority, a cause not so potent in the moral and social sphere as he deemed it; and my object has been less to discuss its merits than to paint the institutions and people of America as they are, tracing what is peculiar in them not merely to the sovereignty of the masses, but also to the history and traditions of the race, to its fundamental ideas, to its material environment. I have striven to avoid the temptations of the deductive method, and to present simply the facts of the case, arranging and connecting them as best I can, but letting them speak for themselves rather than pressing upon the reader my own conclusions. The longer any one studies a vast subject, the more cautious in inference does he become. When I first visited America eighteen years ago, I brought home a swarm of bold generalizations. Half of them were thrown overboard after a second visit in 1881. Of the half that remained, some were dropped into the Atlantic when I returned across it after a third visit in 1883-84: and although the two later

journeys gave birth to some new views, these views are fewer and more discreetly cautious than their departed sisters of 1870. I can honestly say that I shall be far better pleased if readers of a philosophic turn find in the book matter on which they feel they can safely build theories for themselves, than if they take from it theories ready made.

In the effort to bring within reasonable compass a description of the facts of to-day, I have had to resist another temptation, that of straying off into history. The temptation has been strong, for occasional excursions into the past might have been used not only to enliven but to confirm and illustrate statements the evidence for which it has sometimes been necessary to omit. American history, of which Europeans know scarcely anything, may be wanting in colour and romance when compared with the annals of the great states of the Old World; but it is eminently rich in political instruction. I hope that my American readers, who, if I am not mistaken, know the history of their country better than the English know that of England, will not suppose that I have ignored this instruction, but will allow for the omissions forced on me by the magnitude of the subject which I am trying to compress into three volumes. Similar reasons have compelled me to deal briefly with the legal aspects of the Constitution; but this is a defect which the lay reader will probably deem a merit.

Even when limited by the exclusion of history and law, the subject remains so vast and complex as to make necessary an explanation of the conception I have formed of it, and of the plan upon which the book has been constructed.

There are three main things that one wishes to know

about a national commonwealth, viz. its framework and constitutional machinery, the methods by which it is worked, the forces which move it and direct its course. It is natural to begin with the first of these. Accordingly, I begin with the Government; and as the powers of government are two-fold, being vested partly in the National or Federal authorities and partly in the States, I begin with the National Government, whose structure presents less difficulty to European minds, because it resembles the national government in each of their own countries. Part I. therefore contains an account of the several Federal authorities, the President, Congress, the Courts of Law. It describes the relations of the National or central power to the several States. It discusses the nature of the Constitution as a fundamental supreme law, and shows how this stable and rigid instrument has been in a few points expressly, in many others tacitly and half unconsciously modified.

Part II. deals similarly with the State Governments, examining the constitutions that have established them, the authorities which administer them, the practical working of their legislative bodies. And as local government is a matter of State regulation, there is also given some account of the systems of rural and city government which have been created in the various States, and which have, rural government for its merits and city government for its faults, become the theme of copious discussion among foreign students of American institutions.

(Part III.) The whole machinery, both of National and of State governments, is worked by the political parties. Parties have been organized far more elaborately in the United States than anywhere else in the world, and have passed more completely under the control of a professional

class. The party organizations in fact form a second body of political machinery, existing side by side with that of the legally constituted government, and scarcely less complicated. Politics, considered not as the science of government, but as the art of winning elections and securing office, has reached in the United States a development surpassing in elaborateness that of England or France as much as the methods of those countries surpass the methods of Servia or Roumania. Part III. contains a sketch of this party system, and of the men who "run" it, topics which deserve and would repay a fuller examination than they have yet received even in America, or than my limits permit me to bestow.

(Part IV.) The parties, however, are not the ultimate force in the conduct of affairs. Behind and above them stands the people. Public opinion, that is the mind and conscience of the whole nation, is the opinion of persons who are included in the parties, for the parties taken together are the nation; and the parties, each claiming to be its true exponent, seek to use it for their purposes. Yet it stands above the parties, being cooler and larger minded than they are; it awes party leaders and holds in check party organizations. No one openly ventures to resist it. It determines the direction and the character of national policy. It is the product of a greater number of minds than in any other country, and it is more indisputably sovereign. It is the central point of the whole American polity. To describe it, that is, to sketch the leading political ideas, habits and tendencies of the American people, and show how they express themselves in action, is the most difficult and also the most vital part of my task; and to this task the twelve chapters of Part IV. are devoted.

(Part V.) As the descriptions given and propositions

advanced in treating of the party system and of public opinion are necessarily general, they seem to need illustration by instances drawn from recent American history. I collect three such instances in Part V., and place there a discussion of several political questions which lie outside party politics, together with some chapters in which the attempt is made to estimate the strength and weakness of democratic government as it exists in the United States, and to compare the phenomena which it actually shows with those which European speculation has attributed to democracy in general.

(Part VI.) At this point the properly political sections of the book end. But there are certain non-political institutions, certain aspects of society, certain intellectual or spiritual forces, which count for so much in the total life of the country, in the total impression which it makes and the hopes for the future which it raises, that they cannot be left unnoticed. These, or rather such of them as I have been able to study and as have not been fully handled by others before me, will be found briefly treated in Part VI. In the view which I take of them, they are all germane, though not all equally germane, to the main subject of the book, which is the character, temper, and tendencies of the American nation, as they are expressed primarily in political and social institutions, secondarily in literature and manners.

This plan involves some repetition. But an author who finds himself obliged to choose between repetition and obscurity ought not to doubt as to his choice. Whenever it has been necessary to trace a phenomenon to its source, or to explain a connection between several phenomena, I have not hesitated, knowing that one must not expect a reader to carry in his mind all that has been told already, to re-state a material

fact, or re-enforce a view which gives to the facts what I conceive to be their true significance.

It may be thought that a subject of this great compass ought, if undertaken at all, to be undertaken by a native American. No native American has, however, undertaken it. Such a writer would doubtless have great advantages over a stranger. Yet there are two advantages which a stranger, or at least a stranger who is also an Englishman, with some practical knowledge of English politics and English law, may hope to secure. He is struck by some things which a native does not think of explaining, because they are too obvious, and whose influence on politics or society he forgets to estimate, since they seem to him part of the order of nature. And the stranger finds it easier to maintain a position of detachment, detachment not only from party prejudice, but from those prepossessions in favour of persons, groups, constitutional dogmas, national pretensions, which a citizen can scarcely escape except by falling into that attitude of impartial cynicism which sours and perverts the historical mind as much as prejudice itself. He who regards a wide landscape from a distant height sees its details imperfectly, and must unfold his map in order to make out where each village lies, and how the roads run from point to point. But he catches the true perspective of things better than if he were standing among them. The great features of the landscape, the valleys, slopes, and mountains, appear in their relative proportion: he can estimate the height of the peaks and the breadth of the plains. So one who writes of a country not his own may turn his want of familiarity with details to good account if he fixes his mind strenuously on the main characteristics of the people and their institutions, while not forgetting to

fill up gaps in his knowledge by frequent reference to native authorities. My own plan has been first to write down what struck me as the salient and dominant facts, and then to test, by consulting American friends and by a further study of American books, the views which I had reached.

To be non-partisan, as I trust to have been, in describing the politics of the United States, is not difficult for a European, especially if he has the good fortune to have intimate friends in both the great American parties. To feel and show no bias in those graver and more sharply accentuated issues which divide men in Europe, the issues between absolutism, oligarchy, and democracy; between strongly unified governments and the policy of decentralization, this is a harder task, yet a not less imperative duty. This much I can say, that no fact has been either stated or suppressed, and no opinion put forward, with the purpose of serving any English party-doctrine or party-policy, or in any way furnishing arguments for use in any English controversy. The admirers and the censors of popular government are equally likely to find in the present treatise materials suited to their wishes; and in many cases, if I may judge from what has befallen some of my predecessors, they will draw from these materials conclusions never intended by the author.

Few things are more difficult than to use aright arguments founded on the political experience of other countries. As the chief practical use of history is to deliver us from plausible historical analogies, so a comprehension of the institutions of other nations enables us to expose sometimes the ill-grounded hopes, sometimes the idle fears, which loose reports about those nations generate. Direct inferences from the success or failure

of a particular constitutional arrangement or political usage in another country are rarely sound, because the conditions differ in so many respects that there can be no certainty that what flourishes or languishes under other skies and in another soil will likewise flourish or languish in our own. Many an American institution would bear a different fruit if transplanted to England, as there is hardly an English institution which has not undergone, like the plants and animals of the Old World, some change in America. The examination and appraisement of the institutions of the United States is no doubt full of instruction for Europe, full of encouragement, full of warning; but its chief value lies in what may be called the laws of political biology which it reveals, in the new illustrations and enforcements it supplies of general truths in social and political science, truths some of which were perceived long ago by Plato and Aristotle, but might have been forgotten had not America poured a stream of new light upon them. Now and then we may directly claim transatlantic experience as accrediting or discrediting some specific constitutional device or the policy of some enactment. But even in these cases he who desires to rely on the results shown in America must first satisfy himself that there is such a parity of conditions and surroundings in respect to the particular matter as justifies him in reasoning directly from ascertained results there to probable results in his own country.

It is possible that these pages, or at least those of them which describe the party system, may produce on European readers an impression which the author neither intends nor desires. They may set before him a picture with fewer lights and deeper shadows than I have wished it to contain. Sixteen years ago I travelled

in Iceland with two friends. We crossed the great Desert by a seldom trodden track, encountering, during two months of late autumn, rains, tempests, snowstorms, and other hardships too numerous to recount. But the scenery was so grand and solemn, the life so novel, the character of the people so attractive, the historic and poetic traditions so inspiring, that we returned full of delight with the marvellous isle. When we expressed this enchantment to our English friends, we were questioned about the conditions of travel, and forced to admit that we had been frozen and starved, that we had sought sleep in swamps or on rocks, that the Icelanders lived in huts scattered through a wilderness, with none of the luxuries and few even of the comforts of life. Our friends passed over the record of impressions to dwell on the record of physical experiences, and conceived a notion of the island totally different from that which we had meant to convey. We perceived too late how much easier it is to state tangible facts than to communicate impressions. If I may attempt to apply the analogy to the United States and their people, I will say that they make on the visitor an impression so strong, so deep, so fascinating, so inwoven with a hundred threads of imagination and emotion, that he cannot hope to reproduce it in words, and to pass it on undiluted to other minds. With the broad facts of politics it is otherwise. These a traveller can easily set forth, and is bound in honesty to set forth, knowing that in doing so he must state much that is sordid, much that will provoke unfavourable comment. The European reader grasps these tangible facts, and, judging them as though they existed under European conditions, draws from them conclusions disparaging to the country and

the people. What he probably fails to do, because this is what the writer is most likely to fail in enabling him to do, is to realize the existence in the American people of a reserve of force and patriotism more than sufficient to sweep away all the evils which are now tolerated, and to make the politics of the country worthy of its material grandeur and of the private virtues of its inhabitants. America excites an admiration which must be felt upon the spot to be understood. The hopefulness of her people communicates itself to one who moves among them, and makes him perceive that the graver faults of politics may be far less dangerous there than they would be in Europe. A hundred times in writing this book have I been disheartened by the facts I was stating: a hundred times has the recollection of the abounding strength and vitality of the nation chased away these tremors.

There are other risks to which such a book as this is necessarily exposed. There is the risk of supposing that to be generally true which the writer has himself seen or been told, and the risk of assuming that what is now generally true is likely to continue so. Against the former of these dangers he who is forewarned is forearmed: as to the latter I can but say that whenever I have sought to trace a phenomenon to its causes I have also sought to inquire whether these causes are likely to be permanent, a question which it is well to ask even when no answer can be given. I have attributed less to the influence of democracy than most of my predecessors have done, believing that explanations drawn from a form of government, being easy and obvious, ought to be cautiously employed. Some one has said that the end of philosophy is to diminish the number of causes, as the aim of chemistry is to re-

PART I

CHAPTER II

THE NATION AND THE STATES

A FEW years ago the American Protestant Episcopal Church was occupied at its annual Convention in revising its liturgy. It was thought desirable to introduce among the short sentence prayers a prayer for the whole people; and an eminent New England divine proposed the words "O Lord, bless our nation." Accepted one afternoon on the spur of the moment, the sentence was brought up next day for reconsideration, when so many objections were raised by the laity to the word "nation," as importing too definite a recognition of national unity, that it was dropped, and instead there were adopted the words "O Lord, bless these United States."

To Europeans who are struck by the patriotism and demonstrative national pride of their transatlantic visitors, this fear of admitting that the American people constitute a nation seems extraordinary. But it is only the expression on its sentimental side of the most striking and pervading characteristic of the political system of the country, the existence of a double government, a double allegiance, a double patriotism. America—I call it America (leaving out of sight South America, Canada, and Mexico), in order to avoid using

at this stage the term United States—America is a Commonwealth of commonwealths, a Republic of republics, a State which, while one, is nevertheless composed of other States even more essential to its existence than it is to theirs.

This is a point of so much consequence, and so apt to be misapprehended by Europeans, that a few sentences may be given to it.

When within a large political community smaller communities are found existing, the relation of the smaller to the larger usually appears in one or other of the two following forms. One form is that of a League, in which a number of political bodies, be they monarchies or republics, are bound together so as to constitute for certain purposes, and especially for the purpose of common defence, a single body. The members of such a composite body or league are not individual men but communities. It exists only as an aggregate of communities, and will therefore vanish so soon as the communities which compose it separate themselves from one another. Moreover it deals with and acts upon these communities only. With the individual citizen it has nothing to do, no right of taxing him, or judging him, or making laws for him, for in all these matters it is to his own community that the allegiance of the citizen is due. A familiar instance of this form is to be found in the Germanic Confederation as it existed from 1815 till 1866. The Hanseatic League in mediæval Germany, the Swiss Confederation down till the present century, are other examples.

In the second form, the smaller communities are mere subdivisions of that greater one which we call the Nation. They have been created, or at any rate they

exist, for administrative purposes only. Such powers as they possess are powers delegated by the nation, and can be overridden by its will. The nation acts directly by its own officers, not merely on the communities, but upon every single citizen; and the nation, because it is independent of these communities, would continue to exist were they all to disappear. Examples of such minor communities may be found in the departments of modern France and the counties of modern England. Some of the English counties were at one time, like Kent or Dorset, independent kingdoms or tribal districts; some, like Bedfordshire, were artificial divisions from the first. All are now merely local administrative areas, the powers of whose local authorities have been delegated from the national government of England. The national government does not stand by virtue of them, does not need them. They might all be abolished or turned into wholly different communities without seriously affecting its structure.

The American Federal Republic corresponds to neither of these two forms, but may be said to stand between them. Its central or national government is not a mere league, for it does not wholly depend on the component communities which we call the States. It is itself a commonwealth as well as a union of commonwealths, because it claims directly the obedience of every citizen, and acts immediately upon him through its courts and executive officers. Still less are the minor communities, the States, mere subdivisions of the Union, mere creatures of the national government, like the counties of England or the departments of France. They have over their citizens an authority which is their own, and not delegated

by the central government. They have not been called into being by that government. They existed before it. They could exist without it.

The central or national government and the State governments may be compared to a large building and a set of smaller buildings standing on the same ground, yet distinct from each other. It is a combination sometimes seen where a great church has been erected over more ancient homes of worship. First the soil is covered by a number of small shrines and chapels, built at different times and in different styles of architecture, each complete in itself. Then over them and including them all in its spacious fabric there is reared a new pile with its own loftier roof, its own walls, which may perhaps rest on and incorporate the walls of the older shrines, its own internal plan.[1] The identity of the earlier buildings has however not been obliterated; and if the later and larger structure were to disappear, a little repair would enable them to keep out wind and weather, and be again what they once were, distinct and separate edifices. So the American States are now all inside the Union, and have all become subordinate to it. Yet the Union is more than an aggregate of States, and the States are more than parts of the Union. It might be destroyed, and they, adding a few further attributes of power to those they now possess, might survive as independent self-governing communities.

This is the cause of that immense complexity which startles and at first bewilders the student of American institutions, a complexity which makes American history

[1] I do not profess to indicate any one building which exactly corresponds to what I have attempted to describe, but there are several both in Italy and in Egypt that seem to justify the simile.

and current American politics so difficult to the European who finds in them phenomena to which his own experience supplies no parallel. There are two loyalties, two patriotisms; and the lesser patriotism, as the incident in the Episcopal Convention shows, is jealous of the greater. There are two governments, covering the same ground, commanding, with equally direct authority, the obedience of the same citizen.

The casual reader of American political intelligence in European newspapers is not struck by this phenomenon, because State politics and State affairs generally are seldom noticed in Europe. Even the traveller who visits America does not realize its importance, because the things that meet his eye are superficially similar all over the continent, and that which Europeans call the machinery of government is in America conspicuous chiefly by its absence. But a due comprehension of this double organization is the first and indispensable step to the comprehension of American institutions: as the elaborate devices whereby the two systems of government are kept from clashing are the most curious subject of study which those institutions present.

How did so complex a system arise, and what influences have moulded it into its present form? This is a question which cannot be answered without a few words of historical retrospect. I am sensible of the danger of straying into history, and the more anxious to avoid this danger, because the task of describing American institutions as they now exist is more than sufficiently heavy for one writer and one book. But an outline, a brief and plain outline, of the events which gave birth to the Federal system in America, and which have nurtured national feeling without extinguishing

State feeling, seems the most natural introduction to an account of the present Constitution, and may dispense with the need for subsequent explanations and digressions. It is the only excursion into the historical domain which I shall have to ask the reader to make.

CHAPTER III

THE ORIGIN OF THE CONSTITUTION

WHEN in the reign of George III. troubles arose between England and her North American colonists, there existed along the eastern coast of the Atlantic thirteen little communities, the largest of which (Virginia) had not much more than half a million of people, and the total population of which did not reach three millions. All owned allegiance to the British Crown, all, except Connecticut and Rhode Island, received their governors from the Crown; in all, causes were carried by appeal from the colonial courts to the English Privy Council.[1] Acts of the British Parliament ran there, as they now run in the British colonies, whenever expressed to have that effect, and could over-rule such laws as the colonies might make. But practically each colony was a self-governing commonwealth, left to manage its own affairs with scarcely any interference from home. Each had its legislature, its own statutes adding to or modifying the English common law, its local corporate life and traditions, with no small local pride in its own history and institutions, superadded to the pride of forming part of the

[1] In Rhode Island no appeal seems to have lain to the Crown, and the power of legislation was by the charters of 1643 and 1663 left to the colony with the proviso only that the laws should be agreeable to those of England "as near as may be, considering the nature and constitution of the place and people."

English race and the great free British realm. Between the various colonies there was no other political connection than that which arose from their all belonging to this race and realm, so that the inhabitants of each enjoyed in every one of the others the rights and privileges of British subjects.

When the oppressive measures of the home government roused the colonies, they naturally sought to organize their resistance in common.[1] Singly they would have been an easy prey, for it was long doubtful whether even in combination they could make head against regular armies. A congress of delegates from nine colonies held at New York in 1765 was followed by another at Philadelphia in 1774, at which twelve were represented, which called itself Continental (for the name American had not yet become established),[2] and spoke in the name of "the good people of these colonies," the first assertion of a sort of national unity among the English of America. This congress, in which from 1775 onwards all the colonies were represented, was a merely revolutionary body, called into existence by the war with the mother country. But in 1776 it declared the independence of the colonies, and in 1777 it gave itself a new legal character by framing the "Articles of Confederation and Perpetual Union,"[3] whereby the thirteen States (as they now called themselves) entered into a "firm league of friendship" with each other, offensive and defensive, while declaring that "each

[1] There had been a congress of delegates from seven colonies at Albany in 1754 to deliberate on measures relative to the impending war with France, but this, of course, took place with the sanction of the mother country, and was a purely temporary measure.

[2] In the earlier part of last century the name "American" seems to have denoted the native Indians, as it does in Wesley's hymn "The dark Americans convert." The War of Independence gave it its present meaning.

[3] See these Articles in the Appendix at the end of this volume.

State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this Confederation expressly delegated to the United States in Congress assembled."

This Confederation, which was not ratified by all the States till 1781, was rather a league than a national government, for it possessed no central authority except an assembly in which every State, the largest and the smallest alike, had one vote, and this authority had no jurisdiction over the individual citizens. There was no Federal executive, no Federal judiciary, no means of raising money except by the contributions of the States, contributions which they were slow to render, no power of compelling the obedience either of States or individuals to the commands of Congress. The plan corresponded to the wishes of the colonists, who did not yet deem themselves a nation, and who in their struggle against the power of the British Crown were resolved to set over themselves no other power, not even one of their own choosing. But it worked badly even while the struggle lasted, and after the immediate danger from England had been removed by the peace of 1783, it worked still worse, and was in fact, as Washington said, no better than anarchy. The States were indifferent to Congress and their common concerns, so indifferent that it was found difficult to procure a quorum of States for weeks or even months after the day fixed for meeting. Congress was impotent, and commanded respect as little as obedience. Much distress prevailed in the trading States, and the crude attempts which some legislatures made to remedy the depression by emitting inconvertible paper, by constituting other articles than the precious metals legal tender, and by impeding the recovery of debts, aggravated the evil, and in several instances led to sedi-

tious outbreaks.[1] The fortunes of the country seemed at a lower ebb than even during the war with England.

Sad experience of their internal difficulties, and of the contempt with which foreign governments treated them, at last produced a feeling that some firmer and closer union was needed. A convention of delegates from five States met at Annapolis in Maryland in 1786 to discuss methods of enabling Congress to regulate commerce. It drew up a report which condemned the existing state of things, declared that reforms were necessary, and suggested a further general convention in the following year to consider the condition of the Union and the needed amendments in its Constitution. Congress, to which the report had been presented, approved it, and recommended the States to send delegates to a convention, which should "revise the Articles of Confederation, and report to Congress and the several legislatures such alterations and provisions therein as shall, when agreed to in Congress and confirmed by the States, render the Federal Constitution adequate to the exigencies of government and the preservation of the Union."[2]

[1] Rhode Island was the most conspicuous offender. This singular little commonwealth, whose area is 1085 square miles (less than that of Ayrshire or Antrim), is of all the American States that which has furnished the most abundant analogies to the Greek republics of antiquity, and which best deserves to have its annals treated of by a philosophic historian. A curious feature in its politics is the frequent hostility of the agricultural party in the country to the commercial population in the towns which was at its height in 1788. By making herself an alarming example of what the unbridled rule of the multitude may come to, Rhode Island did much to bring the other States to adopt that Federal Constitution which she was herself the last to accept. See the remarks of Mr. M. Smith, Elliot's *Debates*, ii. 335.

[2] The insurrection then raging in Massachusetts may have helped to stimulate Congress to prompt action, for it revealed the want of strength in the State governments.

Mr. Justice Miller remarks with reference to the origin of the Annapolis Convention, "It is not a little remarkable that the suggestion which finally led to the relief, without which as a nation we must soon have

The Convention thus summoned met at Philadelphia on the 14th May 1787, became competent to proceed to business on May 25th, when seven States were represented, and chose George Washington to preside.[1] Delegates attended from every State but Rhode Island, and these delegates, unlike those usually sent to Congress, were the leading men of the country, influential in their several States, and now filled with a sense of the need for comprehensive reforms. The instructions they had received limited their authority to the revision of the Articles of Confederation and the proposing to Congress and the State legislatures such improvements as were required therein.[2] But with admirable boldness, boldness doubly admirable in Englishmen and lawyers, the majority ultimately resolved to disregard these restrictions, and

perished, strongly supports the philosophical maxim of modern times, that of all the agencies of civilization and progress, commerce is the most efficient. What our deranged finances, our discreditable failure to pay our debts, and the sufferings of our soldiers, could not force the several States to attempt, was brought about by a desire to be released from the evils of an unregulated and burdensome commercial intercourse."—Memorial Oration at the celebration of the hundredth anniversary of the promulgation of the Constitution, 17th Sept. 1887.

[1] For some remarks on Constitutional Conventions in the United States see the note to this chapter at the end of this volume.

[2] It was strongly urged when the draft Constitution came up for ratification in the State Conventions that the Philadelphia Convention had no power to do more than amend the Articles of Confederation. To these objections Mr. Wilson of Pennsylvania made answer as follows:—"The business we are told which was intrusted to the late Convention was merely to amend the present Articles of Confederation. This observation has been frequently made, and has often brought to my mind a story that is related of Mr. Pope, who it is well known was not a little deformed. It was customary for him to use this phrase, 'God mend me,' when any little accident happened. One evening a link boy was lighting him along, and coming to a gutter the boy jumped nimbly over it. Mr. Pope called to him to turn, adding 'God mend me!' The arch rogue, turning to light him, looked at him and repeated 'God mend you! He would sooner make half a dozen new ones.' This would apply to the present Confederation, for it would be easier to make another than to amend this."—Elliot's *Debates*, Pennsylvania Convention, vol. ii. p. 472.

to prepare a wholly new Constitution, to be considered and ratified neither by Congress nor by the State legislatures, but by the peoples of the several States.

This famous assembly, which consisted of fifty-five delegates, thirty-nine of whom signed the Constitution which it drafted, sat nearly five months, and expended upon its work an amount of labour and thought commensurate with the magnitude of the task and the splendour of the result. The debates were secret,[1] and fortunately so, for criticism from without might have imperilled a work which seemed repeatedly on the point of breaking down, so great were the difficulties encountered from the divergent sentiments and interests of different parts of the country, as well as of the larger and smaller States.[2] The records of the Convention were left in the hands of Washington, who in 1796 deposited them in the State Department. In 1819 they were published along with the notes of the discussions kept by James Madison (afterwards twice President), who had proved himself one of the ablest and most useful members of the body. From these official records and notes[3] the history of

[1] The fact that the country did not complain of this secrecy is the best proof of the confidence felt in the members of the Convention.

[2] Benjamin Franklin, who was one of the delegates from Pennsylvania (being then eighty-one years of age), was so much distressed at the difficulties which arose and the prospect of failure that he proposed that the Convention, as all human means of obtaining agreement seemed to be useless, should open its meetings with prayer. The suggestion, remarkable as coming from one so well known for his sceptical opinions, might have been adopted but for the fear that the outside public might thus learn how grave the position of affairs was. The original of Franklin's proposition, written in his own still clear and firm hand, with his note stating that only three or four agreed with him, is preserved in the State Department at Washington, where may be also seen the original draft of the Constitution with the signatures of the thirty-nine delegates.

[3] They are printed in the work called Elliot's *Debates* (Philadelphia, 1861), which also contains the extremely interesting debates in some of the State Conventions which ratified the Constitution.

the Convention has been written, and may be found in the instructive volumes of Mr. G. T. Curtis and of Mr. George Bancroft, now the patriarch of American literature.

It is hard to-day, even for Americans, to realize how enormous those difficulties were. The Convention had not only to create *de novo*, on the most slender basis of pre-existing national institutions, a national government for a widely scattered people, but they had in doing so to respect the fears and jealousies and apparently irreconcilable interests of thirteen separate commonwealths, to all of whose governments it was necessary to leave a sphere of action wide enough to satisfy a deep-rooted local sentiment, yet not so wide as to imperil national unity.[1] Well might Hamilton say: "The establishment of a Constitution, in time of profound peace, by the voluntary consent of a whole people, is a prodigy to the completion of which I look forward with trembling anxiety." [2]

[1] The nearest parallels to such a Federal Union as that formed in 1789 were then to be found in the Achæan and Lycian Leagues, which, however, were not mere leagues, but federated nations. Both are referred to by the authors of the *Federalist* (see *post*), but their knowledge was evidently scanty. The acuteness of James Wilson had perceived that the two famous confederations of modern Europe did not supply a model for America. He observed in the Pennsylvania Convention of 1788: "The Swiss cantons are connected only by alliances. The United Netherlands are indeed an assemblage of societies; but this assemblage constitutes no new one, and therefore it does not correspond with the full definition of a Confederate Republic."—Elliot's *Debates*, vol. ii. p. 422. The Swiss Confederation has now become a Republic at once Federal and national, coming in most respects very near to its American model.

[2] *Federalist*, No. lxxxv. He quotes the words of David Hume (*Essays*; "The Rise of Arts and Sciences"): "To balance a large State or society, whether monarchical or republican, on general laws, is a work of so great difficulty that no human genius, however comprehensive, is able by the mere dint of reason and reflection to effect it. The judgments of many must unite in the work: experience must guide their labour; time

It was even a disputable point whether the colonists were already a nation or only the raw material out of which a nation might be formed.[1] There were elements of unity, there were also elements of diversity. All spoke the same language. All, except a few descendants of Dutchmen and Swedes in New York and Delaware, some Germans in Pennsylvania, some children of French Huguenots in New England and the middle States, belonged to the same race.[2] All, except some Roman Catholics in Maryland, professed the Protestant religion. All were governed by the same English Common Law, and prized it not only as the bulwark which had sheltered their forefathers from the oppression of the Stuart kings, but as the basis of their more recent claims of right against the encroachments of George III. and his colonial officers. In ideas and habits of life there was less similarity, but all were republicans, managing their affairs by elective legislatures, attached to local self-government, and animated by a common pride in their successful resistance to England, which they then hated with a true family hatred, a hatred to which her contemptuous treatment of them added a sting.

must bring it to perfection; and the feeling of inconveniences must correct the mistakes which they inevitably fall into in their first trials and experiments." Words strikingly verified in the history of the United States from 1777 downwards.

[1] Mr. Wilson said in the Pennsylvania Convention of 1787: "By adopting this Constitution we shall become a nation: we are not now one. We shall form a national character: we are now too dependent on others." He proceeds with a remarkable prediction of the influence which American freedom would exert upon the Old World.—Elliot's *Debates*, vol. ii. p. 526.

[2] The Irish, a noticeable element in North Carolina and parts of Pennsylvania, Virginia, and New Hampshire, were not Catholic Celts but Scoto-Irish Presbyterians from Ulster, who, animated by resentment at the wrongs and religious persecution they had suffered at home, had been among the foremost combatants in the Revolutionary War.

On the other hand their geographical position made communication very difficult. The sea was stormy in winter, the roads were bad, it took as long to travel by land from Charleston to Boston as to cross the ocean to Europe, nor was the journey less dangerous. The wealth of some States consisted in slaves; of others in shipping; while in others there was a population of small farmers, characteristically attached to old habits. Manufactures had hardly begun to exist. The sentiment of local independence showed itself in intense suspicion of any external authority; and most parts of the country were so thinly peopled that the inhabitants had lived practically without any government, and thought that in creating one they would be forging fetters for themselves. But while these diversities and jealousies made union difficult, two dangers were absent which have beset the framers of constitutions for other nations. There were no reactionary conspirators to be feared, for every one prized liberty and equality. There were no questions between classes, no animosities against rank and wealth, for rank and wealth did not exist.

It was inevitable under such circumstances that the Constitution, while aiming at the establishment of a durable central power, should pay great regard to the existing centrifugal forces. It was and remains what its authors styled it, eminently an instrument of compromises; it is perhaps the most successful instance in history of what a judicious spirit of compromise may effect.[1] Yet out of

[1] Hamilton observed of it in 1788: "The result of the deliberations of all collective bodies must necessarily be a compound as well of the errors and prejudices as of the good sense and wisdom of the individuals of whom they are composed. The compacts which are to embrace thirteen distinct States in a common bond of amity and union must as necessarily be a compromise of as many dissimilar interests and inclinations. How can perfection spring from such materials?"—*Federalist*, No. lxxxv.

the points which it was for this reason obliged to leave unsettled there arose fierce controversies, which after two generations, when accumulated irritation and incurable misunderstanding had been added to the force of material interests, burst into flame in the War of Secession.

The draft Constitution was submitted, as its last article provided, to conventions of the several States (*i.e.* bodies specially chosen by the people for the purpose) for ratification. It was to come into effect as soon as nine States had ratified, the effect of which would have been, in case the remaining States, or any of them, had rejected it, to leave such States standing alone in the world, since the old Confederation was of course superseded and annihilated. Fortunately all the States did eventually ratify the new Constitution, but two of the most important, Virginia and New York,[1] did not do so till the middle of 1788, after nine others had already accepted it; and two, North Carolina and Rhode Island, at first refused, and only consented to enter the new Union more than a year later, when the government it had created had already come into operation.[2]

There was a struggle everywhere over the adoption of the Constitution, a struggle which gave birth to the two great parties that for many years divided the

[1] Virginia was then much the largest State (population in 1790, 747,610). New York was reckoned among the smaller States (population 340,120) but her central geographical position made her adhesion extremely important.

[2] Mr. Justice Miller observes that the refusal of Rhode Island seems to have been largely due to her desire that "her superior advantages of location, and the possession of what was then supposed to be the best harbour on the Atlantic coast, should not be subjected to the control of a Congress which was by that instrument expressly authorized to regulate commerce with foreign nations, and provide that no preference should be given to the ports of any State."—Memorial Oration, *ut supra*.

American people. The chief source of hostility was the belief that a strong central government endangered both the rights of the States and the liberties of the individual citizen. Freedom, it was declared, would perish, freedom rescued from George III. would perish at the hands of her own children.[1] Consolidation (for the word centralization had not yet been invented) would extinguish the State governments and the local institutions they protected. The feeling was very bitter, and in some States, notably in Massachusetts and New York, the majorities were dangerously narrow. Had the decision been left to what is now called "the voice of the people," that is, to the mass of the citizens all over the country, voting at the polls, the voice of the people would probably have pronounced against the Constitution.[2] But this modern method of taking the popular verdict had not been invented. The question was referred to conventions in the several States. The conventions were composed of able men, who listened to weighty arguments, and were themselves influenced by the authority of their leaders. The judgment of the wise prevailed over the prepossessions of the multitude. Yet this judgment would hardly have prevailed but for a cause which is apt to be now overlooked. This was the dread of foreign powers.[3] The United States had at

[1] In the Massachusetts Convention of 1788 Mr. Nason delivered himself of the following pathetic appeal: "And here, sir, I beg the indulgence of this honourable body to permit me to make a short apostrophe to Liberty. O Liberty, thou greatest good! thou fairest property! with thee I wish to live—with thee I wish to die! Pardon me if I drop a tear on the peril to which she is exposed. I cannot, sir, see this highest of jewels tarnished—a jewel worth ten thousand worlds; and shall we part with it so soon? Oh no."—Elliot's *Debates*, ii. 133.

[2] Especially if the question had been voted on everywhere upon the same day. The later decisions in doubtful States were influenced by the approval which other States had already given.

[3] The other chief cause was the economic distress and injury to trade

that time two European monarchies, Spain and England, as its neighbours on the American continent. France had lately held territories to the north of them in Canada, and to the south of them in Louisiana.[1] She had been their ally against England, she became in a few years again the owner of territories on the lower Mississippi. The fear of foreign interference, the sense of weakness, both at sea and on land, against the military monarchies of Europe, was constantly before the mind of American statesmen, and made them anxious to secure at all hazards a national government capable of raising an army and navy, and of speaking with authority on behalf of the new republic. It is remarkable that the danger of European aggression or complications was far more felt in the United States from 1783 down till about 1820, than it has been during the last half century when steam has brought Europe five times nearer than it then was.

Several of the conventions which ratified the Constitution accompanied their acceptance with an earnest recommendation of various amendments to it, amendments designed to meet the fears of those who thought that it encroached too far upon the liberties of the people. Some of these were adopted, immediately after the original instrument had come into force, by the method it prescribes, viz. a two-thirds majority in Con-

consequent on the disorganized condition of several States. See the observations of Mr. Wilson in the Pennsylvania Convention (Elliot's *Debates*, ii. 524). He shows that the case was one of necessity, and winds up with the remark, "The argument of necessity is the patriot's defence as well as the tyrant's plea."

[1] The vast territory then called Louisiana was transferred by France to Spain in 1762, but Spanish government was not established there till 1789. It was ceded by Spain to France in 1800, and purchased by the United States from Napoleon in 1803. Spain held Florida from its discovery till 1819, when she sold it to the United States.

gress and a majority in three-fourths of the States. They are the amendments of 1791, ten in number, and they constitute what the Americans, following a venerable English precedent, call a Bill or Declaration of Rights.

The Constitution of 1789[1] deserves the veneration with which the Americans have been accustomed to regard it. It is true that many criticisms have been passed upon its arrangement, upon its omissions, upon the artificial character of some of the institutions it creates. Recognizing slavery as an institution existing in some States, and not expressly negativing the right of a State to withdraw from the Union, it has been charged with having contained the germ of civil war, though that germ took seventy years to come to maturity. And whatever success it has attained must be in large measure ascribed to the political genius, ripened by long experience, of the Anglo-American race, by whom it has been worked, and who might have managed to work even a worse drawn instrument. Yet, after all deductions, it ranks above every other written constitution for the intrinsic excellence of its scheme, its adaptation to the circumstances of the people, the simplicity, brevity, and precision of its language, its judicious mixture of definiteness in principle with elasticity in details.[2] One is therefore induced

[1] It is hard to say whether one ought to call the Constitution after the year 1787, when it was drafted, or the year 1788, when it was accepted by the requisite number of States, or the year 1789, when it took full effect, the Congress of the Confederation having fixed the first Wednesday in March in that year as the day when it should come into force. The year 1789 has the advantage of being easily remembered, because it coincides with the beginning of the great revolutionary movements of modern Europe. The Confederation may be taken to have expired with the expiry of its Congress, and its Congress died for want of a quorum.

[2] The literary Bostonians laid hold at once of its style as proper for admiration. Mr. Ames said in the Massachusetts Convention of 1788, "Considered merely as a literary performance, the Constitution is an

to ask, before proceeding to examine it, to what causes, over and above the capacity of its authors, and the patient toil they bestowed upon it, these merits are due, or in other words, what were the materials at the command of the Philadelphia Convention for the achievment of so great an enterprise as the creation of a nation by means of an instrument of government. The American Constitution is no exception to the rule that everything which has power to win the obedience and respect of men must have its roots deep in the past, and that the more slowly every institution has grown, so much the more enduring is it likely to prove. There is little in that Constitution that is absolutely new. There is much that is as old as Magna Charta.

The men of the Convention had the experience of the English Constitution. That Constitution, very different then from what it is now, was even then not quite what they thought it. Their view was tinged not only by recollections of the influence exercised by King George the Third, an influence due to transitory causes, but which made them overrate its monarchical element,[1] but also by the presentation of it which they found in the work of Mr. Justice Blackstone. He, as was natural in a lawyer and a man of letters, described rather its theory than its practice, and its theory was many years behind its practice. The powers and functions of the cabinet, the overmastering force of the House of Commons, the intimate connection between legislation and administra-

honour to our country. Legislators have at length condescended to speak the language of philosophy."—Elliot's *Debates*, ii. 55.

[1] There is always a tendency in colonists (perceptible even now in the works of such a writer as the Canadian publicist, Mr. Todd) to overestimate the importance of the Crown, whose conspicuous position as the authority common to the whole empire makes it an object of special interest and respect to persons living at a distance. It touches their imagination, whereas assemblies excite their criticism.

tion, these which are to us now the main characteristics of the English Constitution were still far from fully developed. But in other points of fundamental importance they appreciated and turned to excellent account its spirit and methods.

They had for their oracle of political philosophy the treatise of Montesquieu on the Spirit of Laws, which, published anonymously at Geneva forty years before, had won its way to an immense authority on both sides of the ocean.[1] Montesquieu, contrasting the private as well as public liberties of Englishmen with the despotism of continental Europe, had taken the Constitution of England as his model system, and had ascribed its merits to the division of legislative, executive, and judicial functions which he discovered in it, and to the system of checks and balances whereby its equilibrium seemed to be preserved. No general principle of politics laid such hold on the constitution-makers and statesmen of America as the dogma that the separation of these three functions is essential to freedom. It had already been made the groundwork of several State constitutions. It is always reappearing in their writings: it was never absent from their thoughts. Of the supposed influence of other continental authors, such as Rousseau, or even of English thinkers such as Burke, there are few direct traces in the Federal Constitution or in the classical contemporaneous commentary on and defence of it[2] which we owe to the genius of Hamilton and his hardly less famous coadjutors, Madison and Jay. But we need

[1] Montesquieu is repeatedly quoted by the speakers in the various State conventions, whose discussions have come down to us. See *post*, Chapter XXV.

[2] *The Federalist*, a series of papers published in the New York newspapers in advocacy of the Federal Constitution when the question of accepting it was coming before the New York State Convention.

only turn to the Declaration of Independence and the original constitutions of the States, particularly the Massachusetts Constitution of 1780, to perceive that abstract theories regarding human rights had laid firm hold on the national mind. Such theories naturally expanded with the practice of republican government. But the influence of France and her philosophers belongs chiefly to the years succeeding 1789, when Jefferson, who was fortunately absent in Paris during the Constitutional Convention, headed the democratic propaganda.

Further, they had the experience of their colonial and State governments, and especially, for this was freshest and most in point, the experience of the working of the State Constitutions, framed at or since the date when the colonies threw off their English allegiance. Many of the Philadelphia delegates had joined in preparing these instruments: all had been able to watch and test their operation. They compared notes as to the merits, tested by practice, of the devices which their States had respectively adopted.[1] They had the inestimable advantage of knowing written or rigid constitutions in the concrete; that is to say, of comprehending how a system of government actually moves and plays under the control of a mass of statutory provisions defining and limiting the powers of its several organs. The so-called Constitution of England consists largely of customs, precedents, traditions, understandings, often vague and always flexible. It was quite a different thing, and for the purpose of making a constitution for the American nation an even more important thing, to have lived under and learnt to work systems determined by

[1] There are frequent references in the *Federalist* to the State Constitutions (see especially Letters xlvii. and xlviii.), and the record of the debates in the Convention shows that many of the proposals made were directly drawn from these Constitutions.

the hard and fast lines of a single document having the full force of law, for this experience taught them how much might safely be included in such a document and how far room must be left under it for unpredictable emergencies and unavoidable development.[1]

Lastly, they had one principle of the English common law whose importance deserves special mention, the principle that an act done by any official person or law-making body in excess of his or its legal competence is simply void. Here lay the key to the difficulties which the establishment of a variety of authorities not subordinate to one another, but each supreme in its own defined sphere, necessarily involved. The application of this principle made it possible not only to create a national government which should leave free scope for the working of the State governments, but also so to divide the powers of the national government among various persons and bodies as that none should absorb or overbear the others. By what machinery these objects were attained will sufficiently appear when we come to consider the effect of a written or rigid constitution embodying a fundamental law, and the functions of the judiciary in expounding and applying such a law.[2]

[1] The novelty of written constitutions is dwelt upon with great force by James Wilson in the Pennsylvania Convention.—Elliot's *Debates*, vol. ii.

[2] See *post*, Chapters XXIII. and XXXIII.

CHAPTER IV

NATURE OF THE FEDERAL GOVERNMENT

THE acceptance of the Constitution of 1789 made the American people a nation. It turned what had been a League of States into a Federal State,[1] by giving it a National Government with a direct authority over all citizens. But as this national government was not to supersede the governments of the States, the problem which the Constitution-makers had to solve was two-fold. They had to create a central government. They had also to determine the relations of this central government to the States as well as to the individual citizen. An exposition of the Constitution and criticism of its working must therefore deal with it in these two aspects, as a system of national government built up of executive powers and legislative bodies, like the monarchy of England or the republic of France, and as a Federal system linking together and regulating the relations of a number of commonwealths which are for certain purposes, but for certain purposes only, subordinated to it. It will conduce to clearness if these two aspects are kept distinct; and the most convenient

[1] The distinction is happily expressed in German by the words Staatenbund and Bundesstaat. English has unfortunately no equally concise expressions.

course will be to begin with the former, and first to describe the American system as a National system, leaving its Federal character for the moment on one side.

It must, however, be remembered that the Constitution does not profess to be a complete scheme of government, creating organs for the discharge of all the functions and duties which a civilized community undertakes. It presupposes the State governments. It assumes their existence, their wide and constant activity. It is a scheme designed to provide for the discharge of such and so many functions of government as the States do not already possess and discharge. It is therefore, so to speak, the complement and crown of the State Constitutions, which must be read along with it and into it in order to make it cover the whole field of civil government, as do the Constitutions of such countries as France, Belgium, Italy.

The administrative, legislative, and judicial functions for which the Federal Constitution provides are those relating to matters which must be deemed common to the whole nation, either because all the parts of the nation are alike interested in them, or because it is only by the nation as a whole that they can be satisfactorily undertaken. The chief of these common or national matters are [1]—

War and peace: treaties and foreign relations generally.
Army and navy.
Federal courts of justice.
Commerce, foreign and domestic.

[1] The full list will be found in the Constitution, Art. i. § 8 (printed in the Appendix), with which may be compared the British North America Act 1867 (30 and 31 Vict. cap. 8), and the Federal Council of Australasia Act 1885 (48 and 49 Vict. cap. 60), and the Swiss Constitution of 1874 (Arts. 8, 22, 30, 42, 54, 64, 67-70).

Currency.
Copyright and patents.
The post-office and post roads.
Taxation for the foregoing purposes, and for the general support of the Government.
The protection of citizens against unjust or discriminating legislation by any State.[1]

This list includes the subjects upon which the national legislature has the right to legislate, the national executive to enforce the Federal laws and generally to act in defence of national interests, the national judiciary to adjudicate. All other legislation and administration is left to the several States, without power of interference by the Federal legislature or Federal executive.[2]

Such then being the sphere of the National government, let us see in what manner it is constituted, of what departments it consists.

The framers of this government set before themselves four objects as essential to its excellence, viz.—

Its vigour and efficiency.
The independence of each of its departments (as being essential to the permanency of its form).
Its dependence on the people.
The security under it of the freedom of the individual.

The first of these objects they sought by creating a strong executive, the second by separating the legislative, executive, and judicial powers from one another,

[1] Amendments xiv. and xv.

[2] This list is not intended to be exhaustive, because the respective limits of Federal and State action are fully explained in subsequent chapters. It is given here as a provisional list, sufficient to show in a general way what are the main functions of the national government.

and by the contrivance of various checks and balances, the third by making all authorities elective and elections frequent, the fourth both by the checks and balances aforesaid, so arranged as to restrain any one department from tyranny, and by placing certain rights of the citizen under the protection of the written Constitution.

They had neither the rashness nor the capacity necessary for constructing a Constitution *a priori*. There is wonderfully little genuine inventiveness in the world, and perhaps least of all has been shown in the sphere of political institutions. These men, practical politicians who knew how infinitely difficult a business government is, desired no bold experiments. They preferred, so far as circumstances permitted, to walk in the old paths, to follow methods which experience had tested.[1] Accordingly they started from the system on which their own colonial governments, and afterwards their State governments, had been conducted. This system bore a general resemblance to the British Constitution; and in so far it may with truth be said that the British Constitution became a model for the new national government. They held England to be the freest and best-governed country in the world, but were resolved to avoid the weak points which had enabled King George III. to play the tyrant, and which rendered English liberty, as they thought, far inferior to that which the constitutions of their own States secured. With this venerable mother, and these

[1] Mr. Lowell has said with equal point and truth of the men of the Convention: "They had a profound disbelief in theory and knew better than to commit the folly of breaking with the past. They were not seduced by the French fallacy that a new system of government could be ordered like a new suit of clothes. They would as soon have thought of ordering a suit of flesh and skin. It is only on the roaring loom of time that the stuff is woven for such a vesture of their thought and experience as they were meditating."—Address on Democracy, delivered Oct. 6, 1884.

children, better in their judgment than the mother, before their eyes, they created an executive magistrate, the President, on the model of the State Governor, and of the British Crown. They created a legislature of two Houses, Congress, on the model of the two Houses of their State legislatures, and of the British Parliament. And following the precedent of the British judges, irremovable except by the Crown and Parliament combined, they created a judiciary appointed for life, and irremovable save by impeachment.[1]

In these great matters, however, as well as in many lesser matters, they copied not so much the Constitution of England as the constitutions of their several States, in which, as was natural, many features of the English Constitution had been embodied. It has been truly said that nearly every provision of the Federal Constitution that has worked well is one borrowed from or suggested by some State constitution; nearly every provision that has worked badly is one which the Convention, for want of a precedent, was obliged to devise for itself. To insist on this is not to detract from the glory of that illustrious body, for if we are to credit them with less inventiveness than has sometimes been claimed for them, we must also credit them with a double portion of the wisdom which prefers experience to *a priori* theory, and the sagacity which selects the best

[1] Minor differences between the English and American systems are that the American Federal judge is appointed by the President, "with the advice and consent of the Senate," an English judge by the Crown alone: an American judge is impeachable by the House of Representatives, and tried by the Senate, an English judge is removable by the Crown on an address by both Houses.

In many States a State judge is removable by the legislature or by the governor on an address by the legislature, a provision which has obviously been borrowed from England.

materials from a mass placed before it, aptly combining them to form a new structure.[1]

Of minor divergences between their work and the British Constitution I shall speak subsequently. But one profound difference must be noted here. The British Parliament had always been, was then, and remains now, a sovereign and constituent assembly. It can make and unmake any and every law, change the form of government or the succession to the crown, interfere with the course of justice, extinguish the most sacred private rights of the citizen. Between it and the people at large there is no legal distinction, because the whole plenitude of the people's rights and powers resides in it, just as if the whole nation were present within the chamber where it sits. In point of legal theory it is the nation, being the historical successor of the Folk Moot of our Teutonic forefathers. Both practically and legally, it is to-day the only and the sufficient depositary of the authority of the nation; and is therefore, within the sphere of law, irresponsible and omnipotent.

In the American system there exists no such body. Not merely Congress alone, but also Congress and the President conjoined, are subject to the Constitution, and cannot move a step outside the circle which the Constitution has drawn around them. If they do, they transgress the law and exceed their powers. Such acts as they may do in excess of their powers are void, and may be, indeed ought to be, treated as void by the meanest citizen. The only power which is ultimately sovereign, as the British Parliament is always and

[1] This truth has been worked out with much force and fulness by Mr. Alexander Johnson, in an article in the *New Princeton Review* for September 1887 (published since the text of this chapter was written), some extracts from which will be found in a note at the end of this volume.

directly sovereign, is the people of the States, acting in the manner prescribed by the Constitution, and capable in that manner of passing any law whatever in the form of a constitutional amendment.

This fundamental divergence from the British system is commonly said to have been forced upon the men of 1787 by the necessity, in order to safeguard the rights of the several States, of limiting the competence of the national government.[1] But even without this necessity, even supposing there had been no States to be protected, the jealousy which the American people felt of those whom they chose to govern them, their fear lest one power in the government should absorb the rest, their anxiety to secure the primordial rights of the citizens from attack, either by magistrate or by legislature, would doubtless have led, as happened with the earlier constitutions of revolutionary France, to the creation of a supreme constitution or fundamental instrument of government, placed above and controlling the national legislature itself. They had already such fundamental instrument in the charters of the colonies, which had passed into the constitutions of the several States; and they would certainly have followed, in creating their national constitution, a precedent which they deemed so precious.

The subjection of all the ordinary authorities and organs of government to a supreme instrument expressing the will of the sovereign people, and capable of

[1] It is often assumed by writers on constitutional subjects that a Federal Government presupposes a written or rigid constitution. This is not necessarily so. There have been federations with no fundamental rigid constitution (the Achæan League had apparently none); and it is clear that in America such a fundamental document would in any case have been created to define and limit the powers of each department of government.

being altered by them only, has been usually deemed the most remarkable novelty of the American system. But it is merely an application to the wider sphere of the nation, of a plan approved by the experience of the several States. And the plan had, in these States, been the outcome rather of a slow course of historical development than of conscious determination taken at any one point of their progress from petty settlements to powerful commonwealths. Nevertheless, it may well be that the minds of the leaders who guided this development were to some extent influenced and inspired by recollections of the English Commonwealth of the seventeenth century, which had seen the establishment, though for a brief space only, of a genuine supreme or rigid constitution, in the form of the famous Instrument of Government of A.D. 1653, and some of whose sages had listened to the discourses in which James Harrington, one of the most prescient minds of that great age, showed the necessity for such a constitution, and laid down its principles.[1]

We may now proceed to consider the several departments of the National Government. It will be simplest to describe each separately, and then to examine the relations of each to the others, reserving for subsequent chapters an account of the relations of the National Government as a whole to the several States.

[1] A most interesting analysis of Harrington's views and inquiry into their influence on the development of the American Constitutions may be found in an article by Professor Theodore W. Dwight in the American *Political Science Quarterly* for March 1887. Harrington suggested that the Constitution to be drawn up for England should be subscribed by the people themselves, so as to base it on their consent.

CHAPTER V

THE PRESIDENT

EVERY one who undertakes to describe the American system of government is obliged to follow the American division of it into the three departments—Executive, Legislative, Judicial. I begin with the executive, as the simplest of the three.

The President is the creation of the Constitution of 1789. Under the Confederation there was only a presiding officer of Congress, but no head of the nation.

Why was it thought necessary to have a President at all? The fear of monarchy, of a strong government, of a centralized government, prevailed widely in 1787. George III. was an object of bitter hatred: he remained a bogey to succeeding generations of American children. The Convention found it extremely hard to devise a satisfactory method of choosing the President, nor has the method they adopted proved satisfactory. That a single head is not necessary to a republic might have been suggested to the Americans by those ancient examples to which they loved to recur. The experience of modern Switzerland has made it still more obvious to us now. Yet it was settled very early in the debates of 1787 that the central executive

authority must be vested in one person; and the opponents of the draft Constitution, while quarrelling with his powers, did not accuse his existence.

The explanation is to be found not so much in the wish to reproduce the British Constitution as in the familiarity of the Americans, as citizens of the several States, with the office of State governor (in some States then called President) and in their disgust with the feebleness which Congress had shown under the Confederation in its conduct of the war, and, after peace was concluded, of the general business of the country. Opinion called for a man, because an assembly had been found to lack promptitude and vigour. And it may be conjectured that the alarms felt as to the danger from one man's predominance were largely allayed by the presence of George Washington. Even while the debates were proceeding, every one must have thought of him as the proper person to preside over the Union as he was then presiding over the Convention. The creation of the office would seem justified by the existence of a person exactly fitted to fill it, one whose established influence and ripe judgment would repair the faults then supposed to be characteristic of democracy, its impulsiveness, its want of respect for authority, its incapacity for consistent policy.

Hamilton felt so strongly the need for having a vigorous executive who could maintain a continuous policy, as to propose that the head of the state should be appointed for good behaviour, *i.e.* for life, subject to removal by impeachment. The proposal was defeated, though it received the support of persons so democratically-minded as Madison and Edmund Randolph; but nearly all sensible men, including many who thought better of democracy than Hamilton himself

did,[1] admitted that the risks of foreign war, risks infinitely more serious in the infancy of the Republic than they have subsequently proved, required the concentration of executive powers into a single hand. And the fact that in every one of their commonwealths there existed an officer in whom the State constitution vested executive authority, balancing him against the State legislature, made the establishment of a Federal chief magistrate seem the obvious course.

Assuming that there was to be such a magistrate, the statesmen of the Convention, like the solid practical men they were, did not try to construct him out of their own brains, but looked to some existing models. They therefore made an enlarged copy of the State governor, or to put the same thing differently, a reduced and improved copy of the English king. He is George III. shorn of a part of his prerogative by the intervention of the Senate in treaties and appointments, of another part by the restriction of his action to Federal affairs, while his dignity as well as his influence are diminished by his holding office for four years instead of for life.[2] His salary is too small to permit him either to maintain a Court or to corrupt the legislature; nor can he seduce the virtue of the citizens by the gift of titles of nobility, for such titles are altogether forbidden. Subject to these precautions, he was meant by the

[1] "The disease we are suffering from is democracy," says Hamilton in one of his later letters.

[2] When the Romans got rid of their king, they did not really extinguish the office, but set up in their consul a sort of annual king, limited not only by the short duration of his power, but also by the existence of another consul with equal powers. The Americans hoped to restrain their President not merely by the shortness of his term, but also by diminishing the power which they left to him; and this they did by setting up another authority to which they entrusted certain executive functions, making its consent necessary to the validity of certain classes of the President's executive acts. This is the Senate, whereof more anon.

constitution-framers to resemble the State governor and the British king, not only in being the head of the executive, but in standing apart from and above political parties. He was to represent the nation as a whole, as the governor represented the State commonwealth. The independence of his position, with nothing either to gain or to fear from Congress, would, it was hoped, leave him free to think only of the welfare of the people.

This idea appears in the method provided for the election of a President. To have left the choice of the chief magistrate to a direct popular vote over the whole country would have raised a dangerous excitement, and would have given too much encouragement to candidates of merely popular gifts. To have entrusted it to Congress would have not only subjected the executive to the legislature in violation of the principle which requires these departments to be kept distinct,[1] but have tended to make him the creature of one particular faction instead of the choice of the nation. Hence the device of a double election was adopted, perhaps with a faint reminiscence of the methods by which the Doge was then still chosen at Venice and the Emperor in Germany. The Constitution directs each State to choose a number of presidential electors equal to the number of its representatives in both Houses of Congress. Some weeks later, these electors meet in each State on a day fixed by law, and give their votes in writing for the President and Vice-President.[2] The votes are transmitted, sealed up, to

[1] See the remarks of Mr. Wilson in the Pennsylvania Convention. Elliot's *Debates*, vol. ii. p. 511.

[2] Originally the person who received most votes was deemed to have been chosen President, and the person who stood second, Vice-President. This led to confusion, and was accordingly altered by the twelfth constitutional amendment, adopted in 1804, which provides that the President and Vice-President shall be voted for separately.

the capital and there opened by the president of the Senate in the presence of both Houses and counted. To preserve the electors from the influence of faction, it is provided that they shall not be members of Congress, nor holders of any Federal office. This plan was expected to secure the choice by the best citizens of each State, in a tranquil and deliberate way, of the man whom they in their unfettered discretion should deem fittest to be chief magistrate of the Union. Being themselves chosen electors on account of their personal merits, they would be better qualified than the masses to select an able and honourable man for President. Moreover, as the votes are counted promiscuously, and not by States, each elector's voice would have its weight. He might be in a minority in his own State, but his vote would nevertheless tell because it would be added to those given by electors in other States for the same candidate.

No part of their scheme seems to have been regarded by the constitution-makers of 1787 with more complacency than this,[1] although no part had caused them so much perplexity. No part has so utterly belied their expectations. The presidential electors have become a mere cog-wheel in the machine; a mere contrivance for giving effect to the decision of the people. Their personal qualifications are a matter of indifference. They have no discretion, but are chosen under a pledge—a pledge of honour merely, but a pledge which has never (since 1796) been violated—to vote for a particular candidate. In choosing them the people virtually choose

[1] "The mode of appointment of the chief magistrate of the United States is almost the only part of the system which has escaped without some censure, or which has received the slightest mark of approbation from its opponents."—*Federalist*, No. lxvii., cf. No. l. and the observations of Mr. Wilson in the Convention of Pennsylvania.

the President, and thus the very thing which the men of 1787 sought to prevent has happened,—the President is chosen by a popular vote. Let us see how this happened.

In the first two presidential elections (in 1789 and 1792) the independence of the electors did not come into question, because everybody was for Washington, and parties had not yet been fully developed. Yet in the election of 1792 it was generally understood that electors of one way of thinking were to vote for Clinton as their second candidate (*i.e.* for Vice-President) and those of the other side for John Adams. In the third election (1796) no pledges were exacted from electors, but the election contest in which they were chosen was conducted on party lines, and although, when the voting by the electors arrived, some few votes were scattered among other persons, there were practically only two presidential candidates before the country, John Adams and Thomas Jefferson, for the former of whom the electors of the Federalist party, for the latter those of the Republican (Democratic)[1] party were expected to vote. The fourth election was a regular party struggle, carried on in obedience to party arrangements. Both Federalists and Republicans put the names of their candidates for President and Vice-President before the country, and round these names the battle raged. The notion of leaving any freedom or discretion to the electors had vanished, for it was felt that an issue so great must and could be decided by the nation alone. From that day till now there has never been any question of reviving the true and original intent of the plan of

[1] The party then called Republican has for the last sixty years or so been called Democratic. The party now called Republican did not arise till 1854.

double election,[1] and consequently nothing has ever turned on the personality of the electors. They are now so little significant that to enable the voter to know for which set of electors his party desires him to vote, it is found necessary to put the name of the presidential candidate whose interest they represent at the top of the voting ticket on which their own names are printed.

The completeness and permanence of this change has been assured by the method which now prevails of choosing the electors. The Constitution leaves the method to each State, and in the earlier days many States entrusted the choice to their legislatures. But as democratic principles became developed, the practice of choosing the electors by direct popular vote, originally adopted by Virginia, Pennsylvania, and Maryland, spread by degrees through the other States, till by 1832 South Carolina was the only State which retained the method of appointment by the legislature. She dropped it in 1868, and popular election now rules everywhere.[2] In some States the electors were for a time chosen by districts, like members of the House of Representatives. But the plan of choice by a single popular vote over the whole of the State found increasing favour, seeing that it was in the interest of the party for the time being dominant in the State. In 1828 Maryland was the only State which clung

[1] In 1876 the suggestion was thrown out that the disputed election of that year might be settled by the exercise of free choice on the part of the electors; but the idea found no favour with the politicians.

[2] This, however, is merely matter of State law. Any State could go back to choice by the legislature. Colorado, not having time, after her admission to the Union in 1876, to provide by law for a popular choice of electors to vote in the election of a President in the November of that year, left the choice to the legislature, but now elects its presidential electors by popular vote like the other States.

to district voting. She, too, adopted the "general ticket" system in 1832, since which year it has been universal. Thus the issue comes directly before the people. The parties nominate their respective candidates, in manner to be hereinafter described,[1] a tremendous "campaign" of stump speaking, newspaper writing, street parades, and torchlight processions sets in and rages for about four months: the polling for electors takes place early in November, on the same day over the whole Union, and when the result is known the contest is over, because the subsequent meeting and voting of the electors in their several States is mere matter of form.

So far the method of choice by electors may seem to be merely a roundabout way of getting the judgment of the people. It is more than this. It has several singular consequences, unforeseen by the framers of the Constitution. It has made the election virtually an election by States, for the present system of choosing electors by "general ticket" over the whole State causes the whole weight of a State to be thrown into the scale of one candidate, that candidate whose list of electors is carried in the given State. Pennsylvania, for instance, with her population of four and a half millions, has thirty electoral votes. Each party runs its list or "ticket" of thirty presidential electors for that State, who are bound to vote for the party's candidate, let us say Mr. Blaine or Mr. Cleveland. The Republican list (*i.e.* that which includes the thirty Blaine electors) is carried by a majority of 473,000 against 392,000. It is of course carried entire, if carried at all, because it would be absurd for any partisans of Mr. Blaine to vote for some only and not for all of the electors whose only function is to vote for him. The Blaine list being thus carried, all

[1] See the chapter on National Nominating Conventions in Vol. II.

the thirty electoral votes of Pennsylvania are secured for Mr. Blaine. The hundreds of thousands of votes given by the people for the Democratic list (*i.e.* for the Cleveland electors) do not go to swell the support which Mr. Cleveland obtains in other States, but are utterly lost. Hence in a presidential election, the struggle concentrates itself in the doubtful States, where the great parties are pretty equally divided, and is languid in States where a distinct majority either way may be anticipated, because, since it makes no difference whether a minority be large or small, it is not worth while to struggle hard to increase a minority which cannot be turned into a majority. And hence also a man may be, and has been,[1] elected President by a minority of popular votes.

When such has been the fate of the plan of 1787, it need hardly be said that the ideal President, the great and good man above and outside party, whom the judi-

[1] This happened in 1876, when Mr. Hayes received, on the showing of his own partisans, only 4,033,708 popular votes, against 4,285,992 given for Mr. Tilden, but was elected President by 185 electoral votes against 184 for Mr. Tilden. In 1880 Mr. Garfield was elected by 214 against 155 electoral votes, but had a popular majority of only 4,454,146 against 4,444,952, less than 10,000 out of the whole Union. In 1860 Abraham Lincoln received much less than half the total popular vote, but had an electoral majority among the presidential electors of 180 against 123 voting for his various rivals. So neither Polk in 1844, nor Taylor in 1848, nor Buchanan in 1856, had an absolute majority of the popular vote. In 1884 the whole thirty-six votes of New York State were cast for Mr. Cleveland, although his popular majority in that State, out of a poll of more than 1,100,000, was just over 1100. And as these thirty-six votes turned the election, it was a majority of only 1100 that determined the issue of the struggle over the whole Union, in which nearly 10,000,000 votes were given.

It is an odd result of the system that the bestowal of the suffrage on the negroes has operated against the Republican party which bestowed it. The Southern States have in respect of this increase in their voting population received 37 additional presidential votes, and these have in the two last elections (1880 and 1884) been all thrown for the Democratic candidate.

cious and impartial electors were to choose, has not been secured. The ideal was realized once and once only in the person of George Washington. His successor in the chair (John Adams) was a leader of one of the two great parties then formed, the other of which has, with some changes, lasted down to our own time. Jefferson, who came next, was the chief of that other party, and his election marked its triumph. Nearly every subsequent President has been elected as a party leader by a party vote, and has felt bound to carry out the policy of the men who put him in power.[1] Thus instead of getting an Olympian President raised above faction, America has, despite herself, reproduced the English system of executive government by a party majority, reproduced it in a more extreme form, because in England the titular head of the State, in whose name administrative acts are done, stands in isolated dignity outside party politics. The disadvantages of the American plan are patent; but in practice they are less serious than might be expected, for the responsibility of a great office and the feeling that he represents the whole nation have tended to sober and control the President. Except as regards patronage, he has seldom, at least since the War of Secession, acted as a mere tool of faction, or sought to abuse his administrative powers to the injury of his political adversaries.

The Constitution prescribes no limit for the re-eligibility of the President. He may go on being chosen

[1] John Tyler and Andrew Johnson, both of whom quarrelled with their party, were both elected as Vice-Presidents, and succeeded to the chair on the death of the persons who had been elected Presidents. James Monroe was chosen President in 1820 with practical unanimity; but this was because one of the two parties had for the time been crushed out and started no candidate. So also J. Q. Adams, Monroe's successor, can hardly be called a party leader. After him the party-chosen Presidents go on without interruption.

for one four year period after another for the term of his natural life. But tradition has supplied the place of law. Elected in 1789, Washington submitted to be re-elected in 1792. But when he had served this second term he absolutely refused to serve a third, urging the risk to republican institutions of suffering the same man to continue constantly in office. Jefferson, Madison, Monroe, and Jackson obeyed the precedent, and did not seek, nor their friends for them, re-election after two terms. After them no President was re-elected, except Lincoln, down to General Grant. Grant was President from 1869 to 1873, and again from 1873 to 1877, then came Mr. Hayes; and in 1880 an attempt was made to break the unwritten rule in Grant's favour. Each party, as will be more fully explained hereafter, nominates its candidates in a gigantic party assembly called the National Convention. In the Republican party Convention of 1880 a powerful group of the delegates put forward Grant for nomination as the party candidate, alleging his special services as a ground for giving him the honour of a third term. Had there not been among the Republicans themselves a section personally hostile to Grant, or rather to those who surrounded him, the attempt might have succeeded, though it would probably have involved defeat at the polls. But this hostile section found the prepossession of the people against a third term so strong that, by appealing to the established tradition, they defeated the Grant men in the Convention, and obtained the nomination of Mr. Garfield, who was victorious at the ensuing election. This precedent has been taken as practically decisive for the future, because General Grant, though his administration had been marked by grave faults, was an exceptionally popular figure. A principle affirmed against him is not

likely to be departed from in favour of any aspirant for many elections to come.

The Constitution (Amendment xii., which in this point repeats the original Art. xi. § 1) requires for the choice of a President "a majority of the whole number of electors appointed." If no such majority is obtained by any candidate, *i.e.* if the votes of the electors are so scattered among different candidates, that out of the total number (which is now 401) no one receives an absolute majority (*i.e.* at least 201 votes), the choice goes over to the House of Representatives, who are empowered to choose a President from among the three candidates who have received the largest number of electoral votes. In the House the vote is taken by States, a majority of all the States (*i.e.* at present of twenty States out of thirty-eight) being necessary for a choice. As all the members of the House from a State have but one collective vote, it follows that if they are equally divided among themselves, *e.g.* if half the members from a given State, say Pennsylvania, are Democratic and half Republican, the vote of that State is lost. Supposing this to be the case in half the total number of States, or supposing the States so to scatter their votes that no candidate receives an absolute majority, then no President is chosen, and the Vice-President becomes President.[1]

Only twice has the election gone to the House. In 1800, when the rule still prevailed that the candidate with the largest number of votes became President, and the candidate who came second Vice-President, Jefferson and Aaron Burr received the same number. The Jeffersonian electors meant to make him President, but

[1] As to the choice of the Vice-President by the Senate see Constit., Am. xii.

as they had also all voted for Burr, there was a tie. After a long struggle the House chose Jefferson.[1] Feeling ran high, and had Jefferson been kept out by the votes of the Federalist party, his partisans might possibly have taken up arms. In 1824 Andrew Jackson had 99 electoral votes, and his three competitors (J. Q. Adams, W. H. Crawford, and Henry Clay), 162 votes between them, so that Jackson wanted 32 of an absolute majority. The House chose J. Q. Adams by a vote of thirteen States against seven for Jackson and four for Crawford.[2] In this mode of choice, the popular will may be still less recognized than it is by the method of voting through presidential electors, for if the twenty smaller States were through their representatives in the House to vote for candidate A, and the eighteen larger States for candidate B, A would be seated, though the population of the twenty smaller States is, of course, very much below that of the eighteen larger.

The Constitution seems, though its language is not explicit, to have intended to leave the counting of the votes to the president of the Senate (the Vice-President of the United States); and in early days this officer superintended the count, and decided questions as to the admissibility of doubtful votes. However, Congress has in virtue of its right to be present at the counting assumed the further right of determining all questions

[1] The votes of two States were for a long time divided; but Hamilton's influence at last induced the Federalist members to vote for Jefferson as a person less dangerous to the country than Burr. His action—highly patriotic, for Jefferson was his bitter enemy—cost him his life at Burr's hands.

[2] Clay, unlucky throughout in his ambitions for the presidency, had stood fourth in the electoral vote, and so could not be chosen by the House. Jackson had received the largest popular vote in those States where electors were chosen by the people.

which arise regarding the validity of electoral votes, and has, it need hardly be said, determined them on each occasion from party motives. This would be all very well were a decision by Congress always certain of attainment. But it often happens that one party has a majority in the Senate, another party in the House, and then, as the two Houses vote separately and each differently from the other, a deadlock results. I must pass by the minute and often tedious controversies which have arisen on these matters. But one case deserves special mention, for it illustrates an ingrained and formidable weakness of the present electoral system.

In 1876, Mr. Hayes was the Republican candidate for the presidency, Mr. Tilden the Democratic. The former carried his list of electors in seventeen States, whose aggregate electors numbered 163, and the latter carried his list also in seventeen States, whose aggregate electors numbered 184. Four States remained out of the total thirty-eight, and in each of these four two sets of persons had been chosen by popular vote, each set claiming, on grounds too complicated to be here explained, to be the duly chosen electors from those States respectively.[1] The electoral votes of these four States amounted to twenty-two, so that if in any one of them the Democratic set of electors had been found to have been duly chosen, the Democrats would have secured a majority of electoral votes (the total number of electors being then 369, so that 184 was within one of being a half of that number) whereas even

[1] In Oregon the question was whether one of the chosen electors was disqualified because he was a post master. In Florida there were complaints of fraud, in South Carolina of intimidation, in Louisiana two rival State governments existed, each claiming the right to certify electoral returns. There had doubtless been a good deal of fraud and some violence in several of the Southern States.

if in all of them Republican electors had been chosen, the Republican electors would have had a majority of one only. In such circumstances the only course for the Republican leaders, as good party men, was to claim all these doubtful States. This they promptly did,—party loyalty is the last virtue that deserts politicians,—and the Democrats did the like.

Meanwhile the electors met and voted in their respective States. In the four disputed States the two sets of electors met, voted, and sent up to Washington, from each of these four, double returns of the electoral votes. The result of the election evidently depended on the question which set of returns should be admitted as being the true and legal returns from the four States respectively. The excitement over the whole Union was intense, and the prospect of a peaceful settlement remote, for the Constitution appeared to provide no means of determining the legal questions involved. Congress, as remarked above, had in some previous instances assumed jurisdiction, but seeing that the Republicans had a majority in the Senate, and the Democrats in the House of Representatives, it was clear that the majority in one House would vote for admitting the Republican returns, the majority in the other for admitting the Democratic. Negotiations between the leaders at last arranged a method of escape. A statute was passed creating an electoral commission of five Senators, five members of the House of Representatives, and five Justices of the Supreme Court, who were to determine all questions as to the admissibility of electoral votes from States sending up double returns.[1]

[1] Power was reserved to Congress to set aside by a vote of both Houses the decisions of the Commission, but as the two Houses differed in every case, the Democrats of the House always voting against each

Everything now turned on the composition of the electoral Commission, a body such as had never before been created. The Senate appointed three Republicans and two Democrats. The House of Representatives appointed three Democrats and two Republicans. So far there was an exact balance. The statute had indicated four of the Justices who were to sit, two Republicans and two Democrats, and had left these four to choose a fifth. This fifth was the odd man whose casting vote would turn the scale as between the seven Republican members of the Commission and the seven Democrats. The four Justices chose a Republican Justice, and this choice practically settled the result, for every vote given by the members of the Commission was a strict party vote.[1] They were nearly all lawyers, and had all taken an oath of impartiality. The legal questions were so difficult, and for the most part so novel, that it was possible for a sound lawyer and honest man to take in each case either the view for which the Republicans or that for which the Democrats contended. Still it is interesting to observe that the legal judgment of every commissioner happened to coincide with his party proclivities.[2] All the points in dispute were settled by a vote of eight to seven in favour of the returns transmitted by the Republican electors in the four disputed States, and Mr. Hayes was accordingly declared duly elected by a majority of 185

determination of the Commission, and the Republicans of the Senate supporting it, this provision made no difference.

[1] The Commission decided unanimously that the Democratic set of electors from South Carolina were not duly chosen, but they divided eight to seven as usual on the question of recognizing the Republican electors of that State.

[2] The same phenomenon has been observed in committees of the English House of Commons appointed to deal with purely legal questions, or to sit in a virtually judicial capacity.

electoral votes against 184. The decision may have been right as matter of law,—it is still debated by lawyers,—and there had been so much force and fraud on both sides in Florida, Louisiana, and South Carolina, that no one can say on which side substantial justice lay. Mr. Tilden deserves the credit of having induced his friends both to agree to a compromise slightly to his own disadvantage, and to accept peaceably, though with long and loud complaints, a result which baffled their hopes. I tell the story here because it points to a grave danger in the presidential system. The stake played for is so high that the temptation to fraud is immense; and as the ballots given for the electors by the people are received and counted by State authorities under State laws, an unscrupulous State faction has opportunities for fraud at its command. Ten years passed after the election of 1876, but Congress, although successive Presidents pressed the subject on its attention, did nothing till 1887 to provide against a recurrence of the danger described. It has now enacted a statute which to some extent meets the problem by providing that tribunals appointed in and by each State shall determine what electoral votes from the State are legal votes; and that if the State has appointed no such tribunal, the two Houses of Congress shall determine which votes (in case of double returns) are legal. If the Houses differ the vote of the State is lost.[1] It is, of course, possible under this plan that the State tribunal may decide unfairly; but the main thing is to secure some decision. Unfairness is better than uncertainty.

A President is removable during his term of

[1] There are further provisions in the Act which need not be given here.

office only by means of impeachment, a procedure familiar on both sides of the Atlantic in 1787, when the famous trial of Warren Hastings was still lingering on at Westminster. Impeachment, which had played no small part in the development of English liberties, was deemed by the Americans of those days a valuable element in their new constitution, for it enabled Congress to depose, and the fear of it might be expected to restrain, a treasonably ambitious President. In obedience to State precedents,[1] it is by the House of Representatives that the President is impeached, and by the Senate, sitting as a law court, with the chief justice of the Supreme court, the highest legal official of the country, as presiding officer, that he is tried. A two-thirds vote is necessary to conviction, the effect of which is simply to remove him from and disqualify him for office, leaving him "liable to indictment, trial, judgment, and punishment, according to law" (Constitution, Art. i. § 3, Art. ii. § 4). The impeachable offences are "treason, bribery, or other high crimes and misdemeanours," an expression which some have held to cover only indictable offences, while others extend it to include acts done in violation of official duty and against the interests of the nation, such acts, in fact, as were often grounds for the English impeachments of the seventeenth century. As yet, Andrew Johnson is the only President who has been impeached. His foolish and headstrong conduct made his removal desirable, but as it was doubtful whether any single offence justified a conviction, several of the senators politically opposed to

[1] Impeachment was taken, not directly from English usage, but rather from the Constitutions of Virginia (1776), and Massachusetts (1780), which had, no doubt following the example of England, established this remedy against culpable officials.

him voted for acquittal.[1] A two-thirds majority not having been secured upon any one article (the numbers being thirty-five for conviction, nineteen for acquittal) he was declared acquitted.

In case of the removal of a President by his impeachment, or of his death, resignation, or inability to discharge his duties, the Vice-President steps into his place. The Vice-President is chosen at the same time, by the same electors, and in the same manner as the President. His only functions are to preside in the Senate and to succeed the President. Failing both President and Vice-President it was formerly provided by statute, not by the Constitution, that the presiding officer for the time being of the Senate should succeed to the presidency, and, failing him, the Speaker of the House of Representatives. To this plan there was the obvious objection that it might throw power into the hands of the party opposed to that to which the lately deceased President belonged; and it has therefore been now (by an Act of 1886) enacted that on the death of a President the secretary of state shall succeed, and after him other officers of the administration, in the order of their rank. Four Presidents (Harrison, Taylor, Lincoln, Garfield) have died in office, and been succeeded by Vice-Presidents, and in the first and third of these instances the succeeding Vice-President has reversed the policy of his predecessor, and become involved in a quarrel with the party which elected him, such as has never yet broken out between a man elected to be President and his party. In practice very little pains are bestowed on the election of a Vice-President.

[1] They may have questioned the expediency of turning him out at that moment; or their political prepossessions against him may have been restrained by a doubt whether the evidence was quite sufficient to support a quasi-criminal charge.

The convention which selects the party candidates usually gives the nomination to this post to a man in the second rank, sometimes as a consolation to a disappointed candidate for the presidential nomination, sometimes to a friend of such a disappointed candidate in order to "placate" his faction, sometimes as a compliment to an elderly leader who is personally popular. If the party carries its candidate for President, it also as a matter of course carries its candidate for Vice-President, and thus if the President happens to die, a man of small account may step into the chief magistracy of the nation.

CHAPTER VI

PRESIDENTIAL POWERS AND DUTIES

THE powers and duties of the President as head of the Federal executive are the following:—

Command of Federal army and navy and of militia of several States when called into service of the United States.

Power to make treaties, but with advice and consent of the Senate, *i.e.* consent of two-thirds of senators present.

„ to appoint ambassadors and consuls, judges of Supreme court, and all other higher Federal officers, but with advice and consent of Senate.

„ to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

„ to convene both Houses on extraordinary occasions.

„ to disagree with (*i.e.* to send back for re-consideration) any bill or resolution passed by Congress, but subject to the power of Congress to finally pass the same, after re-consideration, by a two-thirds majority in each House.

Duty to inform Congress of the state of the Union, and to recommend measures to Congress.

„ to receive foreign ambassadors.

'Duty to "take care that the laws be faithfully executed."

,, to commission all the officers of the United States.

These functions group themselves into four classes—

Those which relate to foreign affairs.

Those which relate to domestic administration.

Those which concern legislation.

The power of appointment.

The conduct of foreign policy would be a function of the utmost importance did not America, happy America, stand apart in a world of her own, unassailable by European powers, easily superior to the other republics of her continent, but with no present motive for aggression upon them. The President, however, has not a free hand in foreign policy. He cannot declare war, for that belongs to Congress, though to be sure he may, as President Polk did in 1845-6, bring affairs to a point at which it is hard for Congress to refrain from the declaration. Treaties require the approval of two-thirds of the Senate; and in order to secure this, it is usually necessary for the Executive to be in constant communication with the Foreign Affairs Committee of that body. The House of Representatives has no legal right to interfere, but it often passes resolutions enjoining or disapproving a particular line of policy; and sometimes invites the Senate to coincide in these expressions of opinion, which then become weightier. The President is by no means bound by such resolutions, and has more than once declared that he does not regard them. But as some treaties, especially commercial treaties, cannot be carried out except by the aid of statutes, and as no war can be entered on without votes of money, the House of Representatives can sometimes indirectly make good

its claim to influence. Many delicate questions, some of them not yet decided, have arisen upon these points, which the Constitution has, perhaps unavoidably, left in half light.[1] In all free countries it is most difficult to define the respective spheres of the legislature and executive in foreign affairs, for while publicity and parliamentary control are needed to protect the people, promptitude and secrecy are the conditions of diplomatic success. Practically, however, and for the purposes of ordinary business, the President is independent of the House, while the Senate, though it can prevent his settling anything, cannot keep him from unsettling everything. He, or rather his secretary of state, for the President has rarely leisure to give close or continuous attention to foreign policy, retains an unfettered initiative, by means of which he may embroil the country abroad or excite passion at home.

The domestic authority of the President is in time of peace very small, because by far the larger part of law and administration belongs to the State governments, and because Federal administration is regulated by statutes which leave little discretion to the executive. In war time, however, and especially in a civil war, it expands with portentous speed. Both as commander-in-chief of the army and navy, and as charged with the "faithful execution of the laws," the President is likely to be led to assume all the powers which the emergency requires. How much he can legally do without the aid of statutes is disputed, for the acts of President Lincoln during the earlier part of the War of Secession, including his proclamation suspending the writ of *Habeas Corpus*, were subsequently legalized by Congress; but it is at

[1] An acute discussion of some of these questions may be found in Dr. Von Holst's *Staatsrecht der Vereinigten Staaten*, § 58.

least clear that Congress can make him, as it did make Lincoln, almost a dictator. And how much the war power may include appears in this, that by virtue of it and without any previous legislative sanction President Lincoln issued his emancipation proclamations of 1862 and 1863, declaring all slaves in the insurgent States to be thenceforth free, although these States were deemed to be in point of law still members of the Union.[1]

It devolves on the executive as well as on Congress to give effect to the provisions of the Constitution whereby a republican form of government is guaranteed to every State: and a State may, on the application of its legislature, or executive (when the legislature cannot be convened), obtain protection against domestic violence. Where, as in Louisiana in 1873, there are two governments disputing by force the control of a State, or where an insurrection breaks out, as in Rhode Island in 1840-2, this power becomes an important one, for it involves the employment of troops, and enables the President (since it is usually on him that the duty falls) to establish the government he prefers to recognize.[2] Fortunately the case has been one of rare occurrence.

[1] The proclamation was expressed not to apply to States which had not seceded, nor to such parts of seceding States as had then already been reconquered by the northern armies. Slavery was finally legally extinguished everywhere by the thirteenth constitutional amendment of 1865.

[2] In the Louisiana case Federal troops were employed: in the Rhode Island case the President authorized the sending in of the militia of Massachusetts and Connecticut, but the Rhode Island troops succeeded in suppressing the rebellion, whose leader was ultimately convicted of high treason against the State and imprisoned. See as to the guarantee of order and republican government in the States, the case of *Luther* v. *Borden* (7 How. 42) and the instructive article of Judge T. M. Cooley in the *International Review* for January 1875. He observes: "The obligation to guarantee a republican form of government to the States, and to protect them against invasion and domestic violence, is one imposed upon 'the United States.' The implication is that the duty was not to depend for its fulfilment on the legislative department exclusively, but that all departments of the government, or at least more than one, were or might be charged with

The President has the right of speaking to the nation by addresses or proclamations, a right not expressly conferred by the Constitution, but inherent in his position. Occasions requiring its exercise are uncommon. On entering office, it is usual for the new magistrate to issue an inaugural address, stating his views on current public questions. Washington also put forth a farewell address, but Jackson's imitation of that famous document was condemned as a piece of vain-glory. It is thought bad taste for the President to deliver stump speeches, and Andrew Johnson injured himself by the practice. But he retains that and all other rights of the ordinary citizen, including the right of voting at Federal as well as State elections in his own State. And he has sometimes taken an active, though a covert, share in the councils of his own party.

The position of the President as respects legislation is a peculiar one. The King of England is a member of the English legislature, because Parliament is in theory his Great Council which he summons and in which he presides, hearing the complaints of the people, and devising legislative remedies.[1] It is as a member of the legislature that he assents to the bills it presents to him, and the term "veto power," since it seems to suggest an authority standing outside to approve or reject,

some duty in this regard. It has been Congress which hitherto has assumed to act upon the guarantee, while application for protection against domestic violence has, on the other hand, been made to the President. From the nature of the case the judiciary can have little or nothing to do with questions arising under this provision of the Constitution."

[1] It need hardly be said that the actual separation of Parliament into two branches, each of which deliberates apart under the presidency of its own chairman (the chairman of one House named by the sovereign, whom he represents, that of the other chosen by the House, but approved by the sovereign), does not exclude the theory that the King Lords and Commons constitute the common council of the nation. They are indeed deemed to be the whole nation, assembled for national purposes.

does not happily describe his right of dealing with a measure which has been passed by the council in which he is deemed to sit, though in point of fact he no longer does so except at the beginning and ending of a session. The American President is not a member of the legislature at all. He is an independent and separate power on whom the people, for the sake of checking the legislature and of protecting themselves against it, have specially conferred the function of arresting by his disapproval its acts. So again the King of England can initiate legislation. According to the older Constitution, statutes purported to be made by him, but "with the advice and consent of the Lords Spiritual and Temporal and of the Commons."[1] According to the modern practice, nearly all important measures are brought into Parliament by his ministers, and nominally under his instructions. The American President cannot introduce bills, either directly or through his ministers, for they do not sit in Congress. All that the Constitution permits him to do in this direction is to inform Congress of the state of the nation, and to recommend the measures which his experience in administration shows to be necessary. This latter function is discharged by the messages which the President addresses to Congress. The most important is that sent by the hands of his private secretary at the beginning of each session.

[1] In the fourteenth century English statutes are expressed to be made by the king, "par conseil et par assentement" of the lords and the commonalty. The words "by the authority" of the Lords and Commons first appear in the eleventh year of Henry VI. (1433), and from the first of Henry VII. (1485) downwards a form substantially the same as the present is followed, viz. "Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, and by the authority of the same." See Stubbs, *Constitutional History*, vol. iii. chap. xx.; Anson, *Law of the Constitution*, vol. i. p. 127.

George Washington used to deliver his addresses orally, like an English king, and drove in a coach and six to open Congress with something of an English king's state. But Jefferson, when his turn came in 1801, whether from republican simplicity, as he said himself, or because he was a poor speaker, as his critics said, began the practice of sending communications in writing; and this has been followed ever since. The message usually discusses the leading questions of the moment, indicates mischiefs needing a remedy, and suggests the requisite legislation. But as no bills are submitted by the President, and as, even were he to submit them, no one of his ministers sits in either House to explain and defend them, the message is a shot in the air without practical result. It is rather a manifesto, or declaration of opinion and policy, than a step towards legislation. Congress is not moved: members go their own ways and bring in their own bills. President Cleveland, for instance, has recently (1887) in two successive messages called attention to the necessity for dealing with the silver question, but Congress has not even attempted to handle the matter.

Far more effective is the President's part in the last stage of legislation, for here he finds means provided for carrying out his will. When a bill is presented to him, he may sign it, and his signature makes it law. If, however, he disapproves of it, he returns it within ten days to the House in which it originated, with a statement of his grounds of disapproval. If both Houses take up the bill again and pass it by a two-thirds majority in each House, it becomes law forthwith without requiring the President's signature.[1] If it fails to obtain this majority it drops.

[1] If Congress adjourns within the ten days allowed the President for

Considering that the arbitrary use, by George III. and his colonial governors, of the power of refusing bills passed by a colonial legislature had been a chief cause of the Revolution of 1776, it is to the credit of the Americans that they inserted this apparently undemocratic provision in the Constitution of 1789.[1] It has worked wonderfully well. Most Presidents have used it sparingly, and only where they felt either that there was a case for delay, or that the country would support them against the majority in Congress. Perverse or headstrong Presidents have been generally defeated by the use of the two-thirds vote to pass the bill over their objections. Washington vetoed (to use the popular expression) two bills only; his successors down till 1830, seven; and till the accession of President Cleveland in 1885 the total number vetoed was only seventy-seven (including the so-called pocket vetoes) in ninety-six years.[2] Mr. Cleveland had up to March 1887 vetoed a much larger number than this, the great majority being bills for granting pensions to persons who served in the northern armies during the War of Seces-

returning the bill, it is lost. His retaining it under these circumstances at the end of a session is popularly called a "pocket veto."

[1] At that time there was only one State, Massachusetts, whose constitution allowed the governor a veto. As to the veto power in the States, an interesting subject, see *post*, Chapters XL. and XLI.

[2] Mr. Horace Davis (in *Johns Hopkins University Studies*, Third Series, Nos. ix. x.) gives the following particulars, up to 1885: "Forty-three of the seventy-seven vetoes emanated from four Presidents, viz. Jackson, eleven; Tyler, ten; Johnson, thirteen; Hayes, nine. All these administrations were periods of fierce conflict with a hostile Congress. Add Madison, six; Pierce, five; Buchanan, seven; and Grant, six; and we have sixty-seven out of seventy-seven vetoes, and only ten remain to the other twelve Presidents. Five subjects comprise the majority of all the vetoes, viz. Internal improvements, seventeen; United States Bank, four; Reconstruction Acts, seven; Rebel claims, four; Interference at elections by marshals and soldiers, seven; in all, thirty-seven out of seventy-seven. Ten bills have been passed over vetoes, viz. one under Tyler, seven under Johnson, one under Hayes, and one under Arthur."

sion.[1] Though many of these bills had been passed with little or no opposition scarcely any were repassed against his veto. The only President who used the power in a reckless way was Andrew Johnson, who, in the course of his three years' struggle with Congress, returned to them the chief bills they passed for carrying out their Southern Reconstruction policy. As the majority opposed to him was a large one in both Houses, these bills were promptly passed over his veto.

So far from exciting the displeasure of the people by resisting the will of their representatives, a President generally gains popularity by the bold use of his veto power. It conveys the impression of firmness; it shows that he has a view and does not fear to give effect to it. The nation, which has often good grounds for distrusting Congress, a body liable to be moved by sinister private influences, or to defer to the clamour of some noisy section outside, looks to the man of its choice to keep Congress in order. By "killing" more bills than all his predecessors put together had done, Mr. Cleveland raised himself in public opinion and improved the prospects of his re-election. The reasons why the veto provisions of the Constitution have succeeded appear to be two. One is that the President, being an elective and not a hereditary magistrate, is deemed to act for the people, is responsible to the people, and has the weight of the people behind him. The people regard him as a check, an indispensable check, not only upon the haste and heedlessness of their

[1] In 1886 Mr. Cleveland returned to Congress 115 bills in all, of which 101 were pension bills. It was attempted to pass a second time only eight of these, and only one was in fact repassed. His chief ground was that a regular bureau exists for dealing with and awarding pensions under the general law, that many of the claims recognized by these bills had been reported against, and that others were open to suspicion.

representatives, the faults that the framers of the Constitution chiefly feared, but upon their tendency to yield either to pressure from any section of their constituents, or to temptations of a private nature. He is expected to resist these tendencies on behalf of the whole people, whose interests may suffer from the selfishness as well of sections as of individuals. The other reason is that a veto can never take effect unless there is a substantial minority of Congress, a minority exceeding one-third in one or other House, which agrees with the President. Should the majority threaten him he is therefore sure of considerable support. Hence this arrangement is preferable to a plan, such as that of the French Constitution of 1791 [1] (under which the king's veto could be overridden by passing a bill in three successive years), for enabling the executive simply to delay the passing of a measure which may be urgent, or which a vast majority of the legislature may desire. In its practical working the presidential veto power furnishes an interesting illustration of the tendency of unwritten or flexible constitutions to depart from, of written or rigid constitutions to cleave to, the letter of the law. The strict legal theory of the rights of the head of the State is in this point exactly the same in England and in America. But whereas it is now the undoubted duty of an English king to assent to every bill passed by both Houses of Parliament, however strongly he may personally disapprove its provisions,[2] it is the no less undoubted duty

[1] As the majority in France was unable to attain its will by constitutional means without waiting three years, it was the more disposed to overthrow the Constitution.

[2] Queen Elizabeth, in A.D. 1597, assented to forty-three bills passed in that session, and "advised herself upon" forty-eight. William III. refused to assent to five bills. The last instance of the use of the "veto power" in England was by Queen Anne in 1707 on a Scotch militia bill. Mr. Tod (*Parliamentary Government in the English Colonies*, ii. p. 319)

of an American President to exercise his independent judgment on every bill, not sheltering himself under the representatives of the people, or foregoing his own opinion at their bidding.[1]

As the President is charged with the whole Federal administration, and responsible for its due conduct, he must of course be allowed to choose his executive subordinates. But as he may abuse this tremendous power the Constitution associates the Senate with him, requiring the "advice and consent" of that body to the appointments he makes. It also permits Congress to vest in the courts of law, or in the heads of departments, the right of appointing to "inferior offices."[2] This last clause has been used to remove many posts from the nomination of the President. But a vast number, roughly estimated

mentions that in 1858 changes in a private railway bill were compelled by an intimation to its promoters that, if they were not made, the royal power of rejection would be exercised.

[1] The practical disuse of the "veto power" in England is due not merely to the decline in the authority of the Crown, but to the fact that, since the Revolution, the Crown acts only on the advice of responsible ministers, who necessarily command a majority in the House of Commons. A bill therefore cannot be passed against the wishes of the ministry unless in the rare case of their being ministers on sufferance, and even in that event they would be able to prevent its passing by advising the Crown to prorogue or dissolve Parliament before it had gone through all its stages. In 1868 a bill (the Irish Church Suspension Bill) was carried through the House of Commons by Mr. Gladstone against the opposition of the then Tory ministry which was holding office on sufferance; but it was rejected on second reading by a large majority in the House of Lords. Had that House seemed likely to accept it the case would have arisen which I have referred to, and the only course for the ministry would have been to dissolve Parliament.

It was urged against the provision in the Constitution of 1789 for the President's veto that the power would be useless, because in England the Crown did not venture to use it. Wilson replied by observing that the English Crown had not only practically an antecedent negative, but also a means of defeating a bill in the House of Lords by creating new peers. —Elliot's *Debates*, ii. p. 472.

[2] The Constitution also permits Congress to vest the appointment of such inferior offices as it thinks fit in the President alone, so as not to require the Senate's concurrence.

at 3500, and including for example nearly 600 places under the Treasury, and nearly 2000 post-masterships, still remain in his gift. The confirming power entrusted to the Senate has become a political factor of the highest moment. The framers of the Constitution probably meant nothing more than that the Senate should check the President by rejecting nominees who were personally unfit, morally or intellectually, for the post to which he proposed to appoint them. The Senate has always, except in its struggle with President Johnson, left the President free to choose his cabinet ministers. But it early assumed the right of rejecting a nominee to any other office on any ground which it pleased, as for instance, if it disapproved his political affiliations, or simply if it disliked him, or wished to spite the President. Presently the senators from the State wherein a Federal office to which the President had made a nomination lay, being the persons chiefly interested in the appointment, and most entitled to be listened to by the rest of the Senate when considering it, claimed to have a paramount voice in deciding whether the nomination should be confirmed. This claim was substantially yielded, for it applied all round, and gave every senator what he wanted. The senators then proceeded to put pressure on the President. They insisted that before making a nomination to an office in any State he should consult the senators from that State who belonged to his own party, and be guided by their wishes. Such an arrangement benefited all senators alike, because each obtained the right of practically dictating the appointments to those Federal offices which he most cared for, viz. those within the limits of his own State; and each was therefore willing to support his colleagues in securing the same right for themselves as regarded their States respectively. Of course when

a senator belonged to the party opposed to the President, he had no claim to interfere, because places are as a matter of course given to party adherents only. When both senators belonged to the President's party they agreed among themselves as to the person whom they should require the President to nominate. By this system, which obtained the name of the Courtesy of the Senate, the President was practically enslaved as regards appointments, because his refusal to be guided by the senator or senators within whose State the office lay exposed him to have his nomination rejected. The senators, on the other hand, obtained a mass of patronage by means of which they could reward their partisans, control the Federal civil servants of their State, and build up a faction devoted to their interests.[1] Successive Presidents chafed under the yoke, and sometimes carried their nominees either by making a bargain or by fighting hard with the senators who sought to dictate to them. But it was generally more prudent to yield, for an offended senator could avenge a defeat by playing the President a shrewd trick in some other matter; and as the business of confirmation is transacted in secret session, intriguers have little fear of the public before their eyes. The senators might, moreover, argue that they knew best what would strengthen the party in their State, and that the men of their choice were just as likely to be good as those whom some private friend suggested to the President. Thus the system throve and still thrives, though it received a blow

[1] As the House of Representatives could not allow the Senate to engross all the Federal patronage, there has been a tendency towards a sort of arrangement, according to which the greater State offices belong to the senators, while as regards the lesser ones, lying within their respective Congressional districts, members of the House are recognized as entitled to recommend candidates.

from the conflict in 1881 between President Garfield and one of the New York senators, Mr. Roscoe Conkling. This gentleman, finding that Mr. Garfield would not nominate to a Federal office in that State the person he proposed, resigned his seat in the Senate, inducing his co-senator Mr. Platt to do the same. Both then offered themselves for re-election by the State legislature of New York, expecting to obtain from it an approval of their action, and thereby to cow the President. The State legislature, however, in which a faction hostile to the two senators had become powerful, rejected Mr. Conkling and Mr. Platt in favour of other candidates. So the victory remained with Mr. Garfield, while the nation, which had watched the contest eagerly, rubbed its hands in glee at the unexpected *dénouement*.

Before we quit this subject, to which I may return in a later chapter, it must be remarked that the "Courtesy of the Senate" would never have attained its present strength but for the growth in and since the time of President Jackson, of the so-called Spoils System, whereby holders of Federal offices have been turned out at the accession of a new President to make way for the aspirants whose services, past or future, he is expected to requite or secure by the gift of places.[1]

The right of the President to remove from office has given rise to long controversies on which I can only touch. In the Constitution there is not a word about removals; and very soon after it had come into force the question arose whether, as regards those offices for which the confirmation of the Senate is required, the President could remove without its consent. Hamilton had argued in the *Federalist* that the President

[1] See further as to the use of Federal patronage the chapter on the Spoils System in Vol. II.

could not so remove, because it was not to be supposed that the Constitution meant to give him so immense and dangerous a reach of power. Madison argued soon after the adoption of the Constitution that it did permit him so to remove, because the head of the executive must have subordinates whom he can trust, and may discover in those whom he has appointed defects fatal to their usefulness. This was also the view of Chief-Justice Marshall.[1] When the question came to be settled by Congress during the presidency of Washington, Congress, influenced perhaps by respect for his perfect uprightness, took the Madisonian view and recognized the power of removal as vested in the President alone. So matters stood till a conflict arose in 1866 between President Johnson and the Republican majority in both Houses of Congress. In 1867, Congress fearing that the President would dismiss a great number of officials who sided with it against him, passed an Act, known as the Tenure of Office Act, which made the consent of the Senate necessary to the removal of office-holders, even of the President's (so-called) cabinet ministers, permitting him only to suspend them from office during the time when Congress was not sitting. The constitutionality of this Act has been much doubted, and its policy is now generally condemned.[2] It was a blow struck in the heat of passion. When President Grant succeeded

[1] Mr. Justice Story in his *Commentaries on the Constitution*, argues against the Madison doctrine, but he does so in view not of such questions as presented themselves in 1867, but of the conduct of President Jackson (who was in power when Story wrote) in making wholesale partisan removals. The whole subject of the President's appointing power is elaborately and judiciously treated in an article in the *Papers of the American Historical Association*, vol. i., by Lucy M. Salmon.

[2] Mr. James G. Blaine, for instance, who was a member of the Congress which passed the Act, has in his *Twenty Years in Congress* expressed his disapproval of it.

in 1869, the Act was greatly modified, and it has now (1887) been with general approval repealed.

How dangerous it is to leave all offices tenable at the mere pleasure of a partisan Executive using them for party purposes, has been shown by the fruits of the Spoils system. On the other hand a President ought to be free to choose his chief advisers and ministers, and even in the lower ranks of the civil service it is hard to secure efficiency if a specific cause, such as could be proved to a jury, must be assigned for dismissal.

Although Congress has transferred many minor appointments to the courts and the heads of departments, and by the Civil Service Reform Act of 1883 has instituted competitive examinations for a number estimated at 14,000, many remain in the free gift of the President; and even as regards those which lie with his ministers, he may be invoked if disputes arise between the minister and politicians pressing the claims of their respective friends. The business of nominating is in ordinary times so engrossing as to leave the chief magistrate of the nation little time for his other functions.

Artemus Ward's description of Abraham Lincoln swept along from room to room in the White House by a rising tide of office seekers is hardly an exaggeration. From the 4th of March, when Mr. Garfield came into power, till he was shot in the July following, he was engaged almost incessantly in questions of patronage.[1] Yet the President's individual judgment has little scope. He must reckon with the Senate; he must requite the supporters of the men to whom he owes his election:

[1] It is related that a friend, meeting Mr. Lincoln one day during the war, observed, "You look anxious, Mr. President; is there bad news from the front?" "No," answered the President, "it isn't the war: it's that post-mastership at Brownsville, Ohio."

he must so distribute places all over the country as to keep the local wire-pullers in good humour, and generally strengthen the party by "doing something" for those who have worked or will work for it. Although the minor posts are practically left to the nomination of the senators or congressmen from the State or district, conflicting claims give infinite trouble, and the more lucrative offices are numerous enough to make the task of selection laborious as well as thankless and disagreeable. No one has more to gain from a thorough scheme of civil service reform than the President. The present system makes a wire-puller of him. It throws work on him unworthy of a fine intellect, and for which a man of fine intellect may be ill qualified. On the other hand the President's patronage is, in the hands of a skilful intriguer, an engine of far-spreading potency. By it he can oblige a vast number of persons, can bind their interests to his own, can fill important places with the men of his choice. Such authority as he has over the party in Congress, and therefore over the course of legislation, such influence as he exerts on his party in the several States, and therefore over the selection of candidates for Congress, is due to his patronage. Unhappily, the more his patronage is used for these purposes, the more it is apt to be diverted from the aim of providing the country with the best officials.

In quiet times the power of the President is not great. He is hampered at every turn by the necessity of humouring his party. He is so much engrossed by the trivial and mechanical parts of his work as to have little leisure for framing large schemes of policy, while in carrying them out he needs the co-operation of Congress, which may be jealous, or indifferent, or

hostile. He has less influence on legislation,—that is to say, his individual volition makes less difference to the course legislation takes, than the Speaker of the House of Representatives. In troublous times it is otherwise, for immense responsibility is then thrown on one who is both the commander-in-chief and the head of the civil executive. Abraham Lincoln wielded more authority than any single Englishman has done since Oliver Cromwell. It is true that the ordinary law was for some purposes practically suspended during the War of Secession. But it will always have to be similarly suspended in similar crises, and the suspension enures to the benefit of the President, who becomes a sort of dictator.

Setting aside these exceptional moments, the dignity and power of the President have, except in respect to the increase in the quantity of his patronage, been raised but little during the last fifty years, that is, since the time of Andrew Jackson, the last President who, not so much through his office as by his personal ascendency and the vehemence of his character, led and guided his party from the chair. Here, too, one sees how a rigid or supreme Constitution serves to keep things as they were. But for its iron hand, the office would surely, in a country where great events have been crowded on one another and opinion changes rapidly under the teaching of events, have either risen or fallen, have gained strength or lost it.

In no European country is there any personage to whom the President can be said to correspond. If we look at parliamentary countries like England, Italy, Belgium, he resembles neither the sovereign nor the prime minister, for the former is not a party chief at all, and the latter is palpably and confessedly nothing

else. The President enjoys more authority, if less dignity, than a European king. He has powers for the moment narrower than a European prime minister, but these powers are more secure, for they do not depend on the pleasure of a parliamentary majority, but run on to the end of his term. One naturally compares him with the French president, but the latter has a prime minister and cabinet, dependent on the chamber, at once to relieve and to eclipse him: in America the President's cabinet is a part of himself and has nothing to do with Congress. The president of the Swiss Confederation is merely the chairman for a year of the Administrative Federal Council (Bundesrath), and can hardly be called the executive chief of the nation.

The difficulty in forming a just estimate of the President's power arises from the fact that it differs so much under ordinary and under extraordinary circumstances. This is a result which republics might seem specially concerned to prevent, and yet it is specially frequent under republics, as witness the cases of Rome and of the Italian commonwealths of the Middle Ages. In ordinary times the President may be compared to the senior or managing clerk in a large business establishment, whose chief function is to select his subordinates, the policy of the concern being in the hands of the board of directors. But when foreign affairs become critical, or when disorders within the Union require his intervention,—when, for instance, it rests with him to put down an insurrection or to decide which of two rival State governments he will recognize and support by arms, everything may depend on his judgment, his courage, and his hearty loyalty to the principles of the Constitution.

It used to be thought that hereditary monarchs were strong because they reigned by a right of their own, not derived from the people. A President is strong for the exactly opposite reason, because his rights come straight from the people. We shall have frequent occasion to observe that nowhere is the rule of public opinion so complete as in America, nor so direct, that is to say, so independent of the ordinary machinery of government. Now the President is deemed to represent the people no less than do the members of the legislature. Public opinion governs by and through him no less than by and through them, and makes him powerful even against the legislature. This is a fact to be remembered by those Europeans who seek in the strengthening of the monarchical principle a cure for the faults of government by assemblies. And it also suggests the risk that attaches to power vested in the hands of a leader directly chosen by the people. A high authority observes[1]:—

"Our holiday orators delight with patriotic fervour to draw distinctions between our own and other countries, and to declare that here the law is master and the highest officer but the servant of the law, while even in free England the monarch is irresponsible and enjoys the most complete personal immunity. But such comparisons are misleading, and may prove mischievous.

[1] Judge T. M. Cooley, in the *International Review* for Jan. 1875. He quotes the words of Edward Livingston: "The gloss of zeal for the public service is always spread over acts of oppression, and the people are sometimes made to consider that as a brilliant exertion of energy in their favour which, when viewed in its true light, would be found a fatal blow to their rights. In no government is this effect so easily produced as in a free republic; party spirit, inseparable from its existence, aids the illusion, and a popular leader is allowed in many instances impunity, and sometimes rewarded with applause, for acts which would make a tyrant tremble on his throne."

In how many directions is not the executive authority in America practically superior to what it is in England? And can we say that the President is really in any substantial sense any more the servant of the law than is the Queen? Perhaps if we were candid we should confess that the danger that the executive may be tempted to a disregard of the law may justly be believed greater in America than in countries where the chief magistrate comes to his office without the selection of the people; and where consequently their vigilance is quickened by a natural distrust."

Although recent Presidents have shown no disposition to strain their authority, it is still the fashion in America to be jealous of the President's action, and to warn citizens against what is called "the one man power." General Ulysses S. Grant was hardly the man to make himself a tyrant, yet the hostility to a third term of office which moved many people who had not been alienated by the faults of his administration, rested not merely on reverence for the example set by Washington, but also on the fear that a President repeatedly chosen would become dangerous to republican institutions. This particular alarm seems to a European groundless. I do not deny that a really great man might exert ampler authority from the presidential chair than its recent occupants have done. The same observation applies to the Popedom and even to the English throne. The President has a position of immense dignity, an unrivalled platform from which to impress his ideas (if he has any) upon the people. But it is hard to imagine a President overthrowing the existing Constitution. He has no standing army, and he cannot create one. Congress can checkmate him by stopping supplies.[1] There is no

[1] Assuming his conduct to be such as to warrant this extreme step,

aristocracy to rally round him. Every State furnishes an independent centre of resistance. If he were to attempt a *coup d'état*, it could only be by appealing to the people against Congress, and Congress could hardly, considering that it is re-elected every two years, attempt to oppose the people. One must suppose a condition bordering on civil war, and the President putting the resources of the executive at the service of one of the intending belligerents, already strong and organized, in order to conceive a case in which he will be formidable to freedom. If there be any danger, it would seem to lie in another direction. The larger a community becomes the less does it seem to respect an assembly, the more is it attracted by an individual man. A bold President who knew himself to be supported by a majority in the country, might be tempted to override the law, and deprive the minority of the protection which the law affords it. He might be a tyrant, not against the masses, but with the masses. But nothing in the present state of American politics gives weight to such apprehensions.

to which Congress is loth to resort, for the reasons stated in Chapter XX. *post.* Contests between Congress and the President have tended to take the form of attaching riders to appropriation bills.

CHAPTER VII

OBSERVATIONS ON THE PRESIDENCY

ALTHOUGH the President has been, not that independent good citizen whom the framers of the Constitution contemplated, but, at least during the last sixty years, a party man, seldom much above the average in character or abilities, the office has attained the main objects for which it was created. Such mistakes as have been made in foreign policy, or in the conduct of the administrative departments, have been rarely owing to the constitution of the office or to the errors of its holder. This is more than one who should review the history of Europe during the last hundred years could say of any European monarchy. Nevertheless, the faults chargeable on hereditary kingship, faults more serious than Englishmen, who have watched with admiration the wisdom of the Crown during the present reign, can easily realize, must not make us overlook certain defects incidental to the American presidency, perhaps to any plan of vesting the headship of the State in a person elected for a limited period.

In a country where there is no hereditary throne nor hereditary aristocracy, an office raised far above all other offices offers too great a stimulus to ambition. This glittering prize, always dangling before

the eyes of prominent statesmen, has a power stronger than any dignity under a European crown to lure them (as it lured Clay and Webster) from the path of straightforward consistency. One who aims at the presidency —and all prominent politicians do aim at it—has the strongest possible motives to avoid making enemies. Now a great statesman ought to be prepared to make enemies. It is one thing to try to be popular—an unpopular man will be uninfluential—it is another to seek popularity by pleasing every section of your party. This is the temptation of presidential aspirants.

A second defect is that the presidential election, occurring once in four years, throws the country for several months into a state of turmoil, for which there may be no occasion. Perhaps there are no serious party issues to be decided, perhaps the best thing would be that the existing Administration should pursue the even tenor of its way. The Constitution, however, requires an election to be held, so the whole costly and complicated machinery of agitation is put in motion; and if issues do not exist, they have to be created.[1] Professional politicians who have a personal interest in the result, because it involves the gain or loss of office to themselves, conduct what is called a "campaign," and the country is forced into a factitious excitement from midsummer, when each party selects the candidate whom it will nominate, to the first week of November, when the contest is decided. There is some

[1] In England, also, there is necessarily a campaign once at least in every six or seven years, when a general election takes place, and sometimes oftener. But note that in England (1) this is the only season of disturbance, whereas in America the Congressional elections furnish a second; (2) the period is usually shorter (three to six weeks, not four months); (3) there have usually been real and momentous issues, dividing the great parties, which the nation had to settle.

political education in the process, but it is bought dearly, not to add that business, and especially finance, is disturbed, and much money spent unproductively.

Again, these regularly recurring elections produce a discontinuity of policy. Even when the new President belongs to the same party as his predecessor, he usually nominates a new cabinet, having to reward his especial supporters. Many of the inferior offices are changed; men who have learned their work make way for others who have everything to learn. If the new President belongs to the opposite party, the change of officials is far more sweeping, and involves larger changes of policy. The evil would be more serious were it not that in foreign policy, where the need for continuity is greatest, the United States have little to do, and that the co-operation of the Senate in this department prevents the divergence of the ideas of one President from those of another from being so wide as it might otherwise be.

Fourthly. The fact that he is re-eligible once, but (practically) only once, operates unfavourably on the President. He is tempted to play his cards for a re-nomination by so pandering to active sections of his own party, or so using his patronage to conciliate influential politicians, as to make them put him forward at the next election. On the other hand, if he is in his second term of office, he has no longer much motive to regard the interests of the nation at large, because he sees that his own political death is near. It may be answered that these two evils will correct one another, that the President will in his first term be anxious to win the respect of the nation, in his second he will have no motive for yielding to the unworthy pressure of party wire-pullers.

But the fact is, as has been pointed out by some foreign observers, that if he were held ineligible for the next term, but eligible for any future term, both sets of evils might be avoided, and both sets of benefits secured. The argument against such a provision would be that it makes that breach in policy which may now happen only once in eight years, necessarily happen once in four years. It would, for instance, have prevented the re-election of Abraham Lincoln in 1864.[1] The founders of the Southern Confederacy of 1861-65 were so much impressed by the objections to the present system that they provided that their President should hold office for six years, but not be re-eligible.

Fifthly. An out-going President is a weak President. During the four months of his stay in office after his successor has been chosen, he declines, except in cases of extreme necessity, to take any new departure, to embark on any executive policy which cannot be completed before he quits office. This is, of course, even more decidedly the case if his successor belongs to the opposite party.[2]

Lastly. The result of an election may be doubtful,

[1] A more obvious and practically sufficient answer is that it would need the passing of an amendment to the Constitution, and it needs a very strong case to induce three-fourths of the States to agree to change this time-honoured document.

[2] Mr. E. A. Freeman (*History of Federal Government*, i. 302) adduces from Polybius (iv. 6, 7) a curious instance showing that the same mischief arose in the Achaian League: "The Ætolians chose for an inroad the time when the official year (of the Achaian General) was drawing to its close, as a time when the Achaian counsels were sure to be weak. Aratos, the General elect, was not yet in office; Timoxenos, the outgoing General, shrank from energetic action so late in his year, and at last yielded up his office to Aratos before the legal time." This effort of Timoxenos to escape from the consequences of the system could not have occurred in governments like those of Rome, England, or the United States, where "the reign of law" is far stricter than it was in the Greek republics.

not from equality of votes, for this is provided against, but from a dispute as to the validity of votes given in or reported from the States. This difficulty arose in 1876, between Mr. Hayes and Mr. Tilden, disclosing the existence of a set of cases for which the Constitution had not provided. It will not recur in quite the same form, for provision has now been made by statute for dealing with disputed returns.[1] But cases may arise in which the returns from a State of its electoral votes will, because notoriously obtained by fraud or force, fail to be recognized as valid by the party whose candidate they prejudice. No presidential election passes without charges of this kind, and these charges are not always unfounded. Should manifest unfairness coincide with popular excitement over a really important issue,[2] the self-control of the people, which has hitherto restrained, as it did in 1877, the party passions of their leaders, may prove unequal to the strain such a crisis would put upon it.

Further observations on the President, as a part of the machinery of government, will be better reserved for the discussion of the relations of the executive and legislative departments. I will therefore only observe here that, even when we allow for the defects last enumerated, the presidential office, if not one of the conspicuous successes of the American Constitution, is nowise to be deemed a failure. The problem of constructing a stable executive in a democratic country is so immensely difficult that anything short of a failure deserves to be called a success. Now the President

[1] See above, page 61.

[2] It was a piece of singular good fortune that the contest between Tilden and Hayes was only a contest between persons, between office-holders and office-seekers, and that no really grave political issue, heating the public mind, was involved.

has, during ninety-nine years, carried on the internal administrative business of the nation with due efficiency. Once or twice, as when Jefferson purchased Louisiana, and Lincoln emancipated the slaves in the revolted States, he has courageously ventured on stretches of authority, held at the time to be doubtfully constitutional, yet necessary, and approved by the judgment of posterity. He has kept the machinery working quietly and steadily when Congress has been distracted by party strife, or paralyzed by the dissensions of the two Houses, or enfeebled by the want of first-rate leaders. The executive has been able, at moments of peril, to rise into a dictatorship, as during the War of Secession, and when peace returned, to sink back into its proper constitutional position. It has shown no tendency so to dwarf the other authorities of the State as to pave the way for a monarchy.

Europeans are struck by the faults of a plan which plunges the nation into a whirlpool of excitement once every four years, and commits the headship of the State to a party leader chosen for a short period.[1] But there is another aspect in which the presidential election may be regarded, and one whose importance is better appreciated in America than in Europe. The election is a solemn periodical appeal to the nation to review its condition, the way in which its business has been carried on, the conduct of the two great parties. It stirs and rouses the nation as nothing else does, forces every one not merely to think about public affairs but to decide how he judges the parties. It is a

[1] Such faults as belong to the plan of popular election are not necessarily incident to the existence of a President; for in France the chief magistrate is chosen by the Chambers, and the interposition between him and the legislature of a responsible ministry serves to render his position less distinctly partisan.

direct expression of the will of ten millions of voters, a force before which everything must bow. It refreshes the sense of national duty; and at great crises it intensifies national patriotism. A presidential election is sometimes, as in 1800, and as again most notably in 1860 and 1864, a turning-point in history. In form it is nothing more than the choice of an administrator who cannot influence policy otherwise than by refusing his assent to bills. In reality it is the deliverance of the mind of the people upon all such questions as they feel able to decide. A curious parallel may in this respect be drawn between it and a general election of the House of Commons in England. A general election is in form a choice of representatives, with reference primarily to their views upon various current questions. In substance it is often a national vote (what the French call a plebiscite), committing executive power to some one prominent statesman. Thus the elections of 1868, 1874, 1880, were practically votes of the nation to place Mr. Gladstone or Mr. Disraeli at the head of the government. So conversely in America, a presidential election, which purports to be merely the selection of a man, is often in reality a decision upon issues of policy, a condemnation of the course taken by one party, a mandate to the other to follow some different course.

The choice of party leaders as Presidents has in America caused far less mischief than might have been expected. Nevertheless, those who have studied the scheme of constitutional monarchy as it works in England, or Belgium, or Italy, or the reproductions of that scheme in British colonies, where the Crown-appointed governor stands outside the strife of factions as a permanent official, will, when they compare the institutions of these

countries with the American presidency, be impressed by the merits of a plan which does not unite all the dignity of office with all the power of office, and which, by placing the titular chief of the executive above and apart from party, makes the civil and military services feel themselves the servants rather of the nation than of any section of the nation, and suggests to them that their labours ought to be rendered with equal heartiness to whatever party may hold the reins of government. Party government may be necessary. So far as we can see, it is necessary. But it is a necessary evil; and whatever tends to diminish its mischievous influence upon the machinery of administration, and to prevent it from obtruding itself upon foreign states; whatever holds up a high ideal of devotion to the nation as a majestic whole, living on from century to century while parties form and dissolve and form again, strengthens and ennobles the commonwealth and all its citizens.

Such an observation of course applies only to monarchy as a political institution. Socially regarded, the American presidency deserves nothing but admiration. The President is simply the first citizen of a free nation, depending for his dignity on no title, no official dress, no insignia of state. It was originally proposed, doubtless in recollection of the English Commonwealth of the seventeenth century, to give him the style of "Highness," and "Protector of the Liberties of the United States." Others suggested "Excellency";[1] and Washington is said to have had leanings to the Dutch style of "High Mightiness." The head of the ruling President does not appear on coins, nor even on postage

[1] In ridicule of this the more democratic members of Congress proposed to call that more ornamental than useful officer the Vice-President "His Superfluous Excellency."

stamps.[1] His residence at Washington called officially "the Executive Mansion," and familiarly "the White House," a building with a stucco front and a portico supported by Doric pillars, said to have been modelled upon the Duke of Leinster's house in Dublin, stands in a shrubbery, and has the air of a large suburban villa rather than of a palace. The rooms, though spacious, are not spacious enough for the crowds that attend the public receptions. The President's salary, which is only $50,000 (£10,000) a year, does not permit display, nor indeed is display expected from him.

Washington, which even so lately as the days of the war was a wilderness of mud and negroes, with a few big houses scattered here and there, has now become one of the handsomest capitals in the world, and cultivates the graces and pleasures of life with eminent success. Besides its political society and its diplomatic society, it is becoming a winter resort for men of wealth and leisure from all over the continent. It is a place where a court might be created, did any one wish to create it. No President has made the attempt; and as the earlier career of the chief magistrate and his wife has seldom qualified them to lead the world of fashion, none is likely to make it. However, the action of the wife of President Hayes, an estimable and energetic lady, whose ardent advocacy of temperance caused the formation of a great many total abstinence societies, called by her name (Lucy Webb), showed that there may be fields in which a President's consort can turn her exalted position to good account, while of course such graces or charms as she possesses will tend to increase his popularity.

[1] The portraits on American postage stamps are those of eminent past Presidents—such as Washington, Jefferson, Lincoln, Grant, Garfield, and of a few famous statesmen, such as Benjamin Franklin and Alexander Hamilton.

To a European observer, weary of the slavish obsequiousness and lip-deep adulation with which the members of reigning families are treated on the eastern side of the Atlantic, fawned on in public and carped at in private, the social relations of an American President to his people are eminently refreshing. There is a great respect for the office, and a corresponding respect for the man as the holder of the office, if he has done nothing to degrade it. There is no servility, no fictitious self-abasement on the part of the citizens, but a simple and hearty deference to one who represents the majesty of the nation, the sort of respect which the proudest Roman paid to the consulship, even if the particular consul was, like Cicero, a "new man." The curiosity of the visitors who throng the White House on reception days is sometimes too familiar; but this fault tends to disappear, and Presidents have now more reason to complain of the persecutions they endure from an incessantly observant journalism. After oscillating between the ceremonious state of George Washington, who drove to open Congress in his coach and six, with outriders and footmen in livery, and the ostentatious plainness of Citizen Jefferson, who rode up alone and hitched his horse to the post at the gate, the President has settled down into an attitude between that of the mayor of a great English town on a public occasion, and that of a European cabinet minister on a political tour. He is followed about and fêted, and in every way treated as the first man in the company; but the spirit of equality which rules the country has sunk too deep into every American nature for him to expect to be addressed with bated breath and whispering reverence. He has no military guard, no chamberlains or grooms-in-waiting; his everyday life is simple; his wife enjoys precedence over all other ladies, but is visited and re-

ceived just like other ladies; he is surrounded by no such pomp and enforces no such etiquette as that which belongs to the governors even of second-class English colonies, not to speak of the viceroys of India and Ireland.

It begins to be remarked in Europe that monarchy, which used to be deemed politically dangerous but socially useful, has now, since its claws have been cut, become politically valuable, but of more doubtful social utility. In the United States the most suspicious democrat—and there are democrats who complain that the office of President is too monarchical—cannot accuse the chief magistracy of having tended to form a court, much less to create those evils which thrive in the atmosphere of European courts. No President dare violate social decorum as European sovereigns have so often done. If he did, he would be the first to suffer.

CHAPTER VIII

WHY GREAT MEN ARE NOT CHOSEN PRESIDENTS

EUROPEANS often ask, and Americans do not always explain, how it happens that this great office, the greatest in the world, unless we except the Papacy, to which any man can rise by his own merits, is not more frequently filled by great and striking men? In America, which is beyond all other countries the country of a "career open to talents," a country, moreover, in which political life is unusually keen and political ambition widely diffused, it might be expected that the highest place would always be won by a man of brilliant gifts. But since the heroes of the Revolution died out with Jefferson and Adams and Madison some sixty years ago, no person except General Grant has reached the chair whose name would have been remembered had he not been President, and no President except Abraham Lincoln has displayed rare or striking qualities in the chair. Who now knows or cares to know anything about the personality of James K. Polk or Franklin Pierce? The only thing remarkable about them is that being so commonplace they should have climbed so high.

Several reasons may be suggested for the fact, which Americans are themselves the first to admit.

One is that the proportion of first-rate ability drawn

into politics is smaller in America than in most European countries. This is a phenomenon whose causes must be elucidated later: in the meantime it is enough to say that in France and Italy, where half-revolutionary conditions have made public life exciting and accessible; in Germany, where an admirably-organized civil service cultivates and develops statecraft with unusual success; in England, where many persons of wealth and leisure seek to enter the political arena, while burning questions touch the interests of all classes and make men eager observers of the combatants, the total quantity of talent devoted to parliamentary or administrative work is far larger, relatively to the population, than in America, where much of the best ability, both for thought and for action, for planning and for executing, rushes into a field which is comparatively narrow in Europe, the business of developing the material resources of the country.

Another is that the methods and habits of Congress, and indeed of political life generally, seem to give fewer opportunities for personal distinction, fewer modes in which a man may commend himself to his countrymen by eminent capacity in thought, in speech, or in administration, than is the case in the free countries of Europe. This is a point to be explained in later chapters. I merely note here in passing what will there be dwelt on.

A third reason is that eminent men make more enemies, and give those enemies more assailable points, than obscure men do. They are therefore in so far less desirable candidates. It is true that the eminent man has also made more friends, that his name is more widely known, and may be greeted with louder cheers. Other things being equal, the famous man is preferable. But other things never are equal. The famous man has

probably attacked some leaders in his own party, has supplanted others, has expressed his dislike to the crotchet of some active section, has perhaps committed errors which are capable of being magnified into offences. No man stands long before the public and bears a part in great affairs without giving openings to censorious criticism. Fiercer far than the light which beats upon a throne is the light which beats upon a presidential candidate, searching out all the recesses of his past life. Hence, when the choice lies between a brilliant man and a safe man, the safe man is preferred. Party feeling, strong enough to carry in on its back a man without conspicuous positive merits, is not always strong enough to procure forgiveness for a man with positive faults.

A European finds that this phenomenon needs in its turn to be explained, for in the free countries of Europe brilliancy, be it eloquence in speech, or some striking achievement in war or administration, or the power through whatever means of somehow impressing the popular imagination, is what makes a leader triumphant. Why should it be otherwise in America? Because in America party loyalty and party organization have been hitherto so perfect that any one put forward by the party will get the full party vote if his character is good and his "record," as they call it, unstained. The safe candidate may not draw in quite so many votes from the moderate men of the other side as the brilliant one would, but he will not lose nearly so many from his own ranks. Even those who admit his mediocrity will vote straight when the moment for voting comes. Besides, the ordinary American voter does not object to mediocrity. He has a lower conception of the qualities requisite to make a statesman than those who direct public opinion in Europe have. He likes his candidate

to be sensible, vigorous, and, above all, what he calls "magnetic," and does not value, because he sees no need for, originality or profundity, a fine culture or a wide knowledge. Candidates are selected to be run for nomination by knots of persons who, however expert as party tacticians, are usually commonplace men; and the choice between those selected for nomination is made by a very large body, an assembly of over eight hundred delegates from the local party organizations over the country, who are certainly no better than ordinary citizens. How this process works will be seen more fully when I come to speak of those Nominating Conventions which are so notable a feature in American politics.

It must also be remembered that the merits of a President are one thing and those of a candidate another thing. An eminent American is reported to have said to friends who wished to put him forward, "Gentlemen, let there be no mistake. I should make a good President, but a very bad candidate." Now to a party it is more important that its nominee should be a good candidate than that he should turn out a good President. A nearer danger is a greater danger. As Saladin says in *The Talisman*, "A wild cat in a chamber is more dangerous than a lion in a distant desert." It will be a misfortune to the party, as well as to the country, if the candidate elected should prove a bad President. But it is a greater misfortune to the party that it should be beaten in the impending election, for the evil of losing national patronage will have come four years sooner. "B" (so reason the leaders), "who is one of our possible candidates, may be an abler man than A, who is the other. But we have a better chance of winning with A than with B, while X, the candidate of

our opponents, is anyhow no better than A. We must therefore run "A." This reasoning is all the more forcible because the previous career of the possible candidates has generally made it easier to say who will succeed as a candidate than who will succeed as a President; and because the wire-pullers with whom the choice rests are better judges of the former question than of the latter.

After all, too, and this is a point much less obvious to Europeans than to Americans, a President need not be a man of brilliant intellectual gifts. Englishmen, imagining him as something like their prime minister, assume that he ought to be a dazzling orator, able to sway legislatures or multitudes, possessed also of the constructive powers that can devise a great policy or frame a comprehensive piece of legislation. They forget that the President does not sit in Congress, that he ought not to address meetings, except on ornamental and (usually) non-political occasions, that he cannot submit bills nor otherwise influence the action of the legislature. His main duties are to be prompt and firm in securing the due execution of the laws and maintaining the public peace, careful and upright in the choice of the executive officials of the country. Eloquence, whose value is apt to be overrated in all free countries, imagination, profundity of thought or extent of knowledge, are all in so far a gain to him that they make him a bigger man, and help him to gain a greater influence over the nation, an influence which, if he be a true patriot, he may use for its good. But they are not necessary for the due discharge in ordinary times of the duties of his post. A man may lack them and yet make an excellent President. Four-fifths of his work is the same in kind as that which devolves on the chairman of a commercial company or

the manager of a railway, the work of choosing good subordinates, seeing that they attend to their business, and taking a sound practical view of such administrative questions as require his decision. Firmness, common sense, and most of all, honesty, an honesty above all suspicion of personal interest, are the qualities which the country chiefly needs in its chief magistrate.

So far we have been considering personal merits. But in the selection of a candidate many considerations have to be regarded besides personal merits, whether they be the merits of a candidate, or of a possible President. The chief of these considerations is the amount of support which can be secured from different States or from different regions, or, as the Americans say, "sections," of the Union. State feeling and sectional feeling are powerful factors in a presidential election. The North-west, including the States from Indiana to Minnesota, is now the most populous region of the Union, and therefore counts for most in an election. It naturally conceives that its interests will be best protected by one who knows them from birth or residence. Hence *prima facie* a North-western man makes the best candidate. A large State casts a heavier vote in the election; and every State is of course more likely to be carried by one of its own children than by a stranger, because his fellow-citizens, while they feel honoured by the choice, gain also a substantial advantage, having a better prospect of such favours as the administration can bestow. Hence, *cæteris paribus*, a man from a large State is preferable as a candidate. New York casts thirty-six votes in the presidential election, Pennsylvania thirty, Ohio twenty-three, Illinois twenty-two, while Vermont and Rhode Island have but four, Delaware, Nevada, and Oregon only three votes each. It

is therefore, parties being usually very evenly balanced, better worth while to have an inferior candidate from one of the larger States, who may carry the whole weight of his State with him, than a somewhat superior candidate from one of the smaller States, who will carry only three or four votes. The problem is further complicated by the fact that some States are already safe for one or other party, while others are doubtful. The North-western and New England States are most of them certain to go Republican: the Southern States are (at present) all of them certain to go Democratic. It is more important to gratify a doubtful State than one you have got already; and hence, *cæteris paribus*, a candidate from a doubtful State, such as New York or Indiana, is to be preferred.

Other minor disqualifying circumstances require less explanation. A Roman Catholic, or an avowed disbeliever in Christianity, would be an impossible candidate. Since the close of the Civil War, any one who fought, especially if he fought with distinction, in the Northern army, has enjoyed great advantages, for the soldiers of that army, still numerous, rally to his name. The two elections of General Grant, who knew nothing of politics, and the fact that his influence survived the faults of his long administration, are the best evidence of the weight of this consideration. It told heavily in favour of both Hayes and Garfield. Similarly a person who fought in the Southern army would be a bad candidate, for he might alienate the North.

On a railway journey in the Far West in 1883 I fell in with two newspaper men from the State of Indiana, who were taking their holiday. The conversation turned on the next presidential election. They spoke hopefully of the chances for nomination by their

party of an Indiana man, a comparatively obscure person, whose name I had never heard. I expressed some surprise that he should be thought of. They observed that he had done well in State politics, that there was nothing against him, that Indiana would work for him. "But," I rejoined, "ought you not to have a man of more commanding character. There is Senator A. Everybody tells me that he is the shrewdest and most experienced man in your party, and that he has a perfectly clean record. Why not run him?" "Why, yes," they answered, "that is all true. But you see he comes from a small State, and we have got that State already. Besides, he wasn't in the war. Our man was. Indiana's vote is worth having, and if our man is run, we can carry Indiana."

"Surely the race is not to the swift, nor the battle to the strong, neither yet bread to the wise, nor yet riches to men of understanding, nor yet favour to men of skill, but time and chance happeneth to them all."

These secondary considerations do not always prevail. Intellectual ability and force of character must influence the choice of a candidate, and their influence is sometimes decisive. They count for more when times are so critical that the need for a strong man is felt. Reformers declare that their weight will go on increasing as the disgust of good citizens with the methods of professional politicians increases. But for many generations past it is not the greatest men in the Roman Church that have been chosen Popes, nor the most brilliant men in the Anglican Church that have been appointed Archbishops of Canterbury.

Although several Presidents have survived their departure from office by many years, only one, John Quincy Adams, has played a part in politics after quit-

ting the White House.[1] It may be that the ex-President has not been a great leader before his accession to office; it may be that he does not care to exert himself after he has held and dropped the great prize, and found (one may safely add) how little of a prize it is. Something, however, must also be ascribed to other features of the political system of the country. It is often hard to find a vacancy in the representation of a given State through which to re-enter Congress; it is disagreeable to recur to the arts by which seats are secured. Past greatness is rather an encumbrance than a help to resuming a political career. Exalted power, on which the unsleeping eye of hostile critics was fixed, has probably disclosed all a President's weaknesses, and has either forced him to make enemies by disobliging adherents, or exposed him to censure for subservience to party interests. He is regarded as having had his day; he belongs already to the past, and unless, like Grant, he is endeared to the people by the memory of some splendid service, he soon sinks into the crowd or avoids neglect by retirement. Possibly he may deserve to be forgotten; but more frequently he is a man of sufficient ability and character to make the experience he has gained valuable to the country, could it be retained in a place where he might turn it to account. They managed things better at Rome in the days of the republic, gathering into their Senate all the fame and experience, all the wisdom and skill, of those who had ruled and fought as consuls and prætors at home and abroad.

"What shall we do with our ex-Presidents?" is a

[1] J. Q. Adams was elected to the House of Representatives within three years from his presidency, and there became for seventeen years the fearless and formidable advocate of what may be called the national theory of the Constitution against the slaveholders.

question often put in America, but never yet answered. The position of a past chief magistrate is not a happy one. He has been a species of sovereign at home. He is received — General Grant was — with almost royal honours abroad. His private income may be insufficient to enable him to live in ease, yet he cannot without loss of dignity, the country's dignity as well as his own, go back to practice at the bar or become partner in a mercantile firm. If he tries to enter the Senate, it may happen that there is no seat vacant for his own State, or that the majority in the State legislature is against him. It has been suggested that he might be given a seat in that chamber as an extra member; but to this plan there is the objection that it would give to the State from which he comes a third senator, and thus put other States at a disadvantage. In any case, however, it would seem only right to bestow such a pension as would relieve him from the necessity of re-entering business or a profession.

We may now answer the question from which we started. Great men are not chosen Presidents, firstly, because great men are rare in politics; secondly, because the method of choice does not bring them to the top; thirdly, because they are not, in quiet times, absolutely needed. Subsequent chapters will, I hope, further elucidate the matter. Meantime, I may observe that the Presidents, regarded historically, fall into three periods, the second inferior to the first, the third rather better than the second.

Down till the election of Andrew Jackson in 1828, all the Presidents had been statesmen in the European sense of the word, men of education, of administrative experience, of a certain largeness of view and dignity of character. All except the first two had served in the

great office of secretary of state; all were well known to the nation from the part they had played. In the second period, from Jackson till the outbreak of the Civil War in 1861, the Presidents were either mere politicians, such as Van Buren, Polk, or Buchanan, or else successful soldiers,[1] such as Harrison or Taylor, whom their party found useful as figure-heads. They were intellectual pigmies beside the real leaders of that generation—Clay, Calhoun, and Webster. A new series begins with Lincoln in 1861. He and General Grant his successor, who cover sixteen years between them, belong to the history of the world. The other less distinguished Presidents of this period contrast favourably with the Polks and Pierces of the days before the war, but they are not, like the early Presidents, the first men of the country. If we compare the eighteen Presidents who have been elected to office since 1789 with the nineteen English prime ministers of the same hundred years, there are but six of the latter, and at least eight of the former whom history calls personally insignificant, while only Washington, Jefferson, Lincoln, and Grant can claim to belong to a front rank represented in the English list by seven or possibly eight names.[2] It would seem that the natural selection of the English parliamentary system, even as modified by the aristocratic habits of that country, has more tendency to bring the highest gifts to the highest place than the more artificial selection of America.

[1] Jackson himself was something of both politician and soldier, a strong character, but a narrow and uncultivated intellect.

[2] The American average would be further lowered were we to reckon in the four Vice-Presidents who have succeeded on the death of the President. Yet the English system does not always secure men personally eminent. Addington, Perceval, and Lord Goderich are no bigger than Tyler or Fillmore, which is saying little enough.

CHAPTER IX

THE CABINET

THERE is in the government of the United States no such thing as a Cabinet in the English sense of the term. But I use the term, not only because it is current in America to describe the chief ministers of the President, but also because it calls attention to the remarkable difference which exists between the great officers of State in America and the similar officers in the free countries of Europe.

Almost the only reference in the Constitution to the ministers of the President is that contained in the power given him to "require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices." All these departments have been created by Acts of Congress. Washington began in 1789 with four only, at the head of whom were the following four officials:—

Secretary of State.
Secretary of the Treasury.
Secretary of War.
Attorney-General.

In 1798 there was added a Secretary of the Navy,

in 1829 a Postmaster-General,[1] and in 1849 a Secretary of the Interior.

These seven now make up what is called the Cabinet.[2] Each receives a salary of $8000 (£1600). All are appointed by the President, subject to the consent of the Senate (which is practically never refused), and may be removed by the President alone. Nothing marks them off from any other officials who might be placed in charge of a department, except that they are summoned by the President to his private council.

None of them can vote in Congress, Art. xi. § 6 of the Constitution providing that "no person holding any office under the United States shall be a member of either House during his continuance in office."

This restriction was intended to prevent the President not merely from winning over individual members of Congress by the allurements of office, but also from making his ministers agents in corrupting or unduly influencing the representatives of the people, as George III. and his ministers corrupted the English Parliament. There is a passage in the *Federalist* (Letter xl.) which speaks of "Great Britain, where so great a proportion of the members are elected by so small a proportion of the people, where the electors are so corrupted by the representatives, and the representatives so corrupted by the Crown." The Fathers of the Constitution were so resolved to avert this latter form of corruption that they

[1] The postmaster-general had been previously deemed a subordinate in the Treasury department, although the office was organized by Act of Congress in 1794; he has been held to belong to the cabinet since Jackson in 1829 invited him to cabinet meetings.

[2] There is also a commissioner of agriculture with a salary of $3000 a year, but his duties are confined to the collection and publication of information, and to the "procuring and distributing of new and valuable seeds and plants." And an Inter-state Commerce Commission, with powers over railways, was created in February 1887 by Act of Congress.

included in the Constitution the provision just mentioned. Its wisdom has sometimes been questioned. But it deserves to be noticed that the Constitution contains nothing to prevent ministers from being present in either House of Congress and addressing it,[1] as the ministers of the King of Italy or of the French President may do in either chamber of Italy or France.[2] It is entirely silent on the subject of communications between officials (other than the President) and the representatives of the people. In Washington's days ministers did occasionally speak to Congress, but they soon ceased to do so, and now never appear before any body larger than a committee. We shall presently see how this arrangement, while seeming to defend Congress against presidential intrigue, tends to weaken its legislative efficiency and to embarrass its relations with the executive.

The President has the amplest range of choice for his ministers. He usually forms an entirely new cabinet when he enters office, even if he belongs to the same party as his predecessor. He may take, he sometimes does take, men who not only have never sat in Congress, but have not figured in politics at all, who may never have sat in a State legislature nor held the humblest office. For instance, in 1869 President Grant offered the post of secretary of the treasury to Mr. A. T. Stewart, the owner of a gigantic dry goods warehouse in New York, who

[1] In February 1881 a committee of eight senators unanimously reported in favour of a plan to give seats (of course without the right to vote) in both Houses of Congress to cabinet ministers, they to attend on alternate days in the Senate and in the House. The committee recommended that the necessary modification in the rules should be made, adding that they had no doubt of the constitutionality of the proposal. Nothing has so far been done to carry out this report.

[2] The Italian ministers usually are members of one or other House. Of course they cannot vote except in the House to which they have been chosen.

had never so much as made a political speech.[1] Generally of course the persons chosen have already made for themselves a position of at least local importance. Often they are those to whom the new President owes his election, or to whose influence with the party he looks for support in his policy.[2] Sometimes they have been his most prominent competitors for the party nominations. Thus Mr. Lincoln in 1860 appointed Mr. Seward and Mr. Chase to be his secretary of state and secretary of the treasury respectively, they being the two men who had come next after him in the selection by the Republican party of a presidential candidate.

The most dignified place in the cabinet is that of the Secretary of State. It is the great prize often bestowed on the man to whom the President is chiefly indebted for his election, or at any rate on one of the leaders of the party. In early days, it was regarded as the stepping-stone to the presidency. Jefferson, Madison, Monroe, and J. Q. Adams had all served as secretaries to preceding presidents. The conduct of foreign affairs is the chief duty of the State department: its head has therefore a larger stage to play on than any other minister, and more chances of fame. His personal importance is all the greater because the President is

[1] The nomination was withdrawn because it was discovered that Mr. Stewart, being engaged in business, was ineligible by statute.

[2] In Mr. Cleveland's cabinet, formed in 1885, the secretary of state had been for sixteen years a senator, and recognized as one of the leaders of his party; the secretary of the treasury was a leading politician in New York State who had never sat in Congress; the secretary of war had been a judge of the supreme court of Massachusetts, and candidate for the governorship of that State; the secretary of the navy was a lawyer, and a prominent politician in New York; the secretary of the interior had sat in the House of Representatives, and had been for nine years a senator; the postmaster-general was a lawyer practising in Wisconsin, and a political leader there; the attorney-general had been governor of his State, and (for eight years) a senator.

usually so much absorbed by questions of patronage as to be forced to leave the secretary to his own devices. Hence the foreign policy of the administration is practically that of the secretary, except so far as the latter is controlled by the Senate, and especially by the chairman of its committee on Foreign Relations. The State department has also the charge of the great seal of the United States, keeps the archives, publishes the statutes, and of course instructs and controls the diplomatic and consular services. It is often said of the President that he is ruled, or as the Americans express it, "run," by his secretary; but naturally this happens only when the secretary is the stronger or more experienced man, and in the same way it has been said of Presidents before now that they were, like sultans, ruled by their wives, or by their boon companions.

The Secretary of the Treasury is minister of finance. His function was of the utmost importance at the beginning of the government, when a national system of finance had to be built up and the Federal Government rescued from its grave embarrassments. Hamilton, who then held the office, effected both. During the War of Secession, it became again powerful, owing to the enormous loans contracted and the quantities of paper money issued, and it remains so now, because it has the management (so far as Congress permits) of the currency and the national debt. The secretary has, however, by no means the same range of action as a finance minister in European countries, for as he is excluded from Congress, although he regularly reports to it, he has nothing directly to do with the imposition of taxes, and very little with the appropriation of revenue to the various burdens of the State.[1]

[1] See *post*, chapter on Congressional Finance, where it will be shown

The Secretary of the Interior is far from being the omnipresent power which a minister of the interior is in France or Italy, or even a Home Secretary in England, since nearly all the functions which these officials discharge belong in America to the State governments or to the organs of local government. He is chiefly occupied in the management of the public lands, still of immense value, despite the lavish grants made to railway companies, and with the conduct of Indian affairs, a troublesome and unsatisfactory department, which has always been a reproach to the United States, and will apparently continue so till the Indians themselves disappear or become civilized. Patents and pensions, the latter a source of great expense and abuse, also belong to his province.

The duties of the Secretary of War, the Secretary of the Navy, and the Postmaster-General may be gathered from their names. But the Attorney-General is sufficiently different from his English prototype to need a word of explanation. He is not only public prosecutor and standing counsel for the United States, but also to some extent what is called on the European continent a minister of justice. He has a general oversight—it can hardly be described as a control—of the Federal judicial departments, and especially of the prosecuting officers called district attorneys, and executive court officers, called United States marshals. He is the legal adviser of the President in those delicate questions, necessarily frequent under the Constitution of the United States, which arise as to the limits of the executive power and the relations of Federal to State authority, and generally in all legal matters. His opinions are frequently pub-

that the chairmen of the committees of Ways and Means and of Appropriations are practically additional ministers of finance.

lished officially, as a justification of the President's conduct, and an indication of the view which the executive takes of its legal position and duties in a pending matter.[1] The attorney-general is always a lawyer of some position, but not necessarily in the front rank of the profession, for political considerations have much to do with determining the President's choice.[2]

It will be observed that from this list of ministerial offices several are wanting which exist in Europe. Thus there is no colonial minister, because no colonies; no minister of education, because that department of business belongs to the several States;[3] no minister of public worship, because the United States Government has nothing to do with any particular form of religion; no minister of commerce, because the activity of the Federal Government in that direction, although increasing, is still limited; no minister of public works, because grants made for this purpose come direct from Congress without the intervention of the executive, and are applied as Congress directs.[4] Much of the work which in Europe would devolve on members of the administration falls in America to committees of Congress, especially

[1] Another variance from the practice of England, where the opinions of the law officers of the Crown are always treated as confidential.

[2] The solicitor-general is a sort of assistant to the attorney, and not (as in England) a colleague.

[3] There was established twenty years ago a Bureau of Education, attached to the department of the Interior, but its function is only to collect and diffuse information on educational subjects. This it does with assiduity and success.

[4] Money voted for river and harbour improvements is voted in sums appropriated to each particular piece of work. The work is supervised by officers of the Engineer corps of the United States army, under the general direction of the war department. Public buildings are erected under the direction of an official called the supervising architect, who is attached to the treasury department. The signal service weather bureau is a branch of the war department, the coast survey of the navy department.

to committees of the House of Representatives. This happens particularly as regards taxation, public works, and the management of the Territories, for each of which matters there exists a committee in both Houses. The well-meant attempt of the founders of the Constitution to keep the legislative and executive departments distinct has resulted in leading the legislature to interfere with ordinary administration more directly and frequently than European legislatures are wont to do. It interferes by legislation because it is debarred from interfering by interpellation.

The respective positions of the President and his ministers are, as has been already explained, the reverse of those which exist in the constitutional monarchies of Europe. There the sovereign is irresponsible and the minister responsible for the acts which he does in the sovereign's name. In America the President is responsible because the minister is nothing more than his servant, bound to obey him, and independent of Congress. The minister's acts are therefore legally the acts of the President. Nevertheless the minister is also responsible and liable to impeachment for offences committed in the discharge of his duties.[1] The question whether he is, as in England, impeachable for giving bad advice to the head of the State has never arisen, but upon the general theory of the Constitution it would rather seem that he is not, unless of course his bad counsel should amount to a conspiracy with the President to commit an impeachable offence. In France the responsibility of the President's ministers does not in theory exclude the responsibility of the President him-

[1] Only once has a minister been impeached. He resigned just before the resolution of the House to impeach him was passed, and so was acquitted on the ground of want of jurisdiction.

self, although practically of course it makes a great difference, because he, like the English Crown, chooses ministers supported by a majority in the chambers.

The position of a cabinet minister appears to carry with it rather less distinction than in England. Formerly he took precedence of the senators, but now they have established their claim to walk before him on public occasions. The point is naturally of more importance as regards the wives of the claimants than as regards the claimants themselves.

So much for the ministers taken separately. It remains to consider how an American Administration works as a whole, this being in Europe, and particularly in England, the most peculiar and significant feature of the parliamentary or so-called "cabinet" system.

In America the administration does not work as a whole. It is not a whole. It is a group of persons, each individually dependent on and answerable to the President, but with no joint policy, no collective responsibility.[1]

When the Constitution was established, and George Washington chosen first President under it, it was intended that the President should be outside and above party, and the method of choosing him by electors was contrived with this very view. Washington belonged to no party, nor indeed, though diverging tendencies were already manifest, had parties yet begun to exist. There was therefore no reason why he should not select his ministers from all sections of opinion. He was the

[1] In America people usually speak of the President and his ministers as the "administration," not as the "government," apparently because he and they are not deemed to govern in the European sense. The latter expression does not seem to be very old in England. Thirty years ago people usually said "the ministry" when they now say "the government."

executive magistrate, who had to conduct the administration of the country. As he was responsible to the nation and not to a majority in Congress, he was not bound to choose persons who agreed with the majority in Congress. As he, and not as in England, the ministry, was responsible for executive acts done, he had to consider, not the opinions or associations of his servants, but their capacity and integrity only. Washington chose as secretary of state Thomas Jefferson, already famous as the chief draftsman of the Declaration of Independence, and as attorney-general another Virginian, Edmund Randolph, both men of extreme democratic leanings, disposed to restrict the action of the Federal Government within narrow limits. For secretary of the treasury he selected Alexander Hamilton of New York, and for secretary of war Henry Knox of Massachusetts. Hamilton was by far the ablest man among those who soon came to form the Federalist party, the party which called for a strong executive, and desired to subordinate the States to the central authority. He soon became recognized as its leader. Knox was of the same way of thinking. Dissensions presently arose between Jefferson and Hamilton, ending in open hostility, but Washington retained them both as ministers till Jefferson retired in 1794 and Hamilton in 1795. The second President, John Adams, kept on the ministers of his predecessor, being in accord with their opinions, for they and he belonged to the now full-grown Federalist party. But before he quitted office he had quarrelled with most of them, having taken important steps without their knowledge and against their wishes. Jefferson, the third President, was a thorough-going party leader, who naturally chose his ministers from his own political adherents. As all subsequent Presidents have

been seated by one or other party; all have felt bound to appoint a party cabinet. Their party expects it from them; and they naturally prefer to be surrounded and advised by their own friends.

So far, an American cabinet resembles an English one. It is composed exclusively of members of one party. But now mark the differences. The parliamentary system of England and of those countries which like Belgium, Italy, and the self-governing British colonies, have more or less modelled themselves upon England, rests on four principles.

The head of the executive (be he king or governor) is irresponsible. Responsibility attaches to the cabinet, *i.e.* to the body of ministers who advise him, so that if he errs, it is through their fault; they suffer and he escapes. The ministers cannot allege, as a defence for any act of theirs, the command of the Crown. If the Crown gives them an order of which they disapprove, they ought to resign.

The ministers sit in the legislature, practically forming in England, as has been observed by the most acute of English constitutional writers, a committee of the legislature, chosen by the majority for the time being.

The ministers are accountable to the legislature, and must resign office[1] as soon as they lose its confidence.

The ministers are jointly as well as severally liable for their acts: *i.e.* the blame of an act done by any of them falls on the whole cabinet, unless one of them chooses to take it entirely on himself and retire from office. Their responsibility is collective.

None of these principles holds true in America. The President is personally responsible for his acts, not

[1] In England and some other countries (*e.g.* the self-governing British colonies) they have the alternative of dissolving Parliament.

indeed to Congress, but to the people, by whom he is chosen. No means exist of enforcing this responsibility, except by impeachment, but as his power lasts for four years only, and is much restricted, this is no serious evil. He cannot avoid responsibility by alleging the advice of his ministers, for he is not bound to follow it, and they are bound to obey him or retire. The ministers do not sit in Congress. They are not accountable to it, but to the President, their master. It may request their attendance before a committee, as it may require the attendance of any other witness, but they have no opportunity of expounding and justifying to Congress as a whole their own, or rather their master's, policy. Hence an adverse vote of Congress does not affect their or his position. If they propose to take a step which requires money, and Congress refuses the requisite appropriation, the step cannot be taken. But a dozen votes of censure will neither compel them to resign nor oblige the President to pause in any line of conduct which is within his constitutional rights. This, however strange it may seem to a European, is a necessary consequence of the fact that the President, and by consequence his cabinet, do not derive their authority from Congress. Suppose (as befell in 1878-9) a Republican President, with a Democratic majority in both Houses of Congress. The President, unless of course he is convinced that the nation has changed its mind since it elected him, is morally bound to follow out the policy which he professed as a candidate, and which the majority of the nation must be held in electing him to have approved. That policy is, however, opposed to the views of the present majority of Congress. They are quite right to check him as far as they can. He is quite right to follow out his own views and principles in

spite of them so far as the Constitution and the funds at his disposal permit. A deadlock may follow. But deadlocks may happen under any system, except that of an omnipotent sovereign, be he a man or an assembly, the risk of deadlocks being indeed the price which a nation pays for the safeguard of constitutional checks.

In this state of things one cannot properly talk of the cabinet apart from the President. An American administration resembles not so much the cabinets of England and France as the group of ministers who surround the Czar or the Sultan, or who executed the bidding of a Roman emperor like Constantine or Justinian. Such ministers are severally responsible to their master, and are severally called in to counsel him, but they have not necessarily any relations with one another, nor any duty of collective action. So while the President commits each department to the minister whom the law provides, and may if he chooses leave it altogether to that minister, the executive acts done are his own acts, by which the country will judge him; and still more is his policy as a whole his own policy, and not the policy of his ministers taken together. The ministers seldom meet in council, and have comparatively little to settle when they do meet, since they have no parliamentary tactics to contrive, no bills to prepare, few questions of foreign policy to discuss. They are not a government, as Europeans understand the term; they are a group of heads of departments, whose chief, though he usually consults them separately, is sometimes glad to bring them together in one room for a talk about politics. A significant illustration of the contrast between the English and American systems may be found in the fact that whereas an English king never now sits in

his own cabinet,[1] because if he did he would be deemed accountable for its decisions, an American President always does, because he is accountable, and really needs advice to help him, not to shield him.[2]

The so-called cabinet is unknown to the statutes as well as to the Constitution of the United States. So is the English cabinet unknown to the law of England. But then the English cabinet is a part, is, in fact, a committee, though no doubt an informal committee, of a body as old as Parliament itself, the Privy Council, or Curia Regis. Of the ancient institutions of England which reappear in the Constitution of the United States, the Privy Council is not one.[3] It may have seemed to the Convention of 1787 to be already obsolete. Even in England it was then already a belated survival from an earlier order of things, and now it lives on only in its committees, three of which, the Board of Trade, the Education department, and the Agricultural department, serve as branches of the administration, one, the Judicial Committee, is a law court, and one, the Cabinet, is the virtual executive of the nation. The framers of the American Constitution saw its unsuitability to their conditions. It was nominated, while with them a council must have been elective. Its only effect would have been to control the President, but for domestic administration control is scarcely needed, because the President has only to execute the laws, while in foreign affairs and appointments the

[1] Queen Anne was the last English sovereign who sat in her own cabinet council, though indeed the cabinet had not yet then become the close body it is now.

[2] Another illustration of the contrast may be found in the fact that when the head of one of the seven departments is absent from Washington the under secretary of the department is often asked to replace him in the cabinet council.

[3] A privy council however appears in the original Constitution of Delaware. (See *post*, Chapter XXXVII.)

Senate controls him already. A third body, over and above the two Houses of Congress, was in fact superfluous. The Senate may appear in some points to resemble the English Privy Council of the seventeenth century, because it advises the executive; but there is all the difference in the world between being advised by those whom you have yourself chosen and those whom election by others forces upon you. So it happens that the relations of the Senate and the President are seldom cordial, much less confidential, even when he and the majority of the Senate belong to the same party, because the Senate and the President are rival powers jealous of one another.

CHAPTER X

THE SENATE

THE National Legislature of the United States, called Congress, consists of two bodies, sufficiently dissimilar in composition, powers, and character to require a separate description. Their respective functions bear some resemblance to those of the two Houses of the English Parliament, which had before 1787 suggested the creation of a double-chambered legislature in all but three of the original thirteen States of the Confederation. Yet the differences between the Senate and the British House of Lords, and in a less degree between the House of Representatives and the British House of Commons, are so considerable that the English reader must be cautioned against applying his English standards to the examination of the American system.[1]

The Senate consists of two persons from each State, who must be inhabitants of that State, and at least thirty years of age. They are elected by the legislature of their State for six years, and are re-eligible. One-third retire every two years, so that the whole body is renewed in a period of six years, the old members being thus at any given moment twice as numerous as the new

[1] "How many bishops have you got in your Upper House?" is the question which an eminent Englishman is reported to have asked soon after his arrival in America.

members elected within the last two years. As there are now thirty-eight States, the number of senators, originally twenty-six, is now seventy-six. This great and unforeseen augmentation must be borne in mind when considering the purposes for which the Senate was created, for some of which a small body is fitter than a large one. As there remain only eight Territories[1] which can be formed into States, the number of senators will not (unless, indeed, existing States are divided, or more than one State created out of some of the Territories) rise beyond ninety-two. This is of course much below the present nominal strength of the English House of Lords[2] (about 560), and below that of the French Senate (300), and the Prussian Herrenhaus (432). No senator can hold any office under the United States. The Vice-President of the Union is *ex officio* president of the Senate, but has no vote, except a casting vote when the numbers are equally divided. Failing him (if, for instance, he dies, or falls sick, or succeeds to the presidency), the Senate chooses one of its number to be president *pro tempore*. His authority in questions of order is very limited, the decision of such questions being held to belong to the Senate itself.[3]

The functions of the Senate fall into three classes—

[1] I reckon in neither the Indian territory, which lies west of Arkansas, nor Alaska, because these districts are not likely within an assignable time to contain a civilized population such as would entitle them to be formed into States.

[2] At the accession of George III. the House of Lords numbered only 174 members.

[3] The powers of the Lord Chancellor as Speaker of the English House of Lords are much narrower than those of the Speaker in the House of Commons. It is worth notice that as the Vice-President is not chosen by the Senate, but by the people, and is not strictly speaking a member of the Senate, so the Lord Chancellor is not chosen to preside by the House of Lords, but by the sovereign, and is not necessarily a peer. This, however, seems to be merely a coincidence, and not the result of a wish to imitate England.

legislative, executive, and judicial.[1] Its legislative function is to pass, along with the House of Representatives, bills which become Acts of Congress on the assent of the President, or even without his consent if passed a second time by a two-thirds majority of each House, after he has returned them for reconsideration. Its executive functions are:—(*a*) To approve or disapprove the President's nominations of Federal officers, including judges, ministers of state, and ambassadors. (*b*) To approve, by a majority of two-thirds of those present, of treaties made by the President—*i.e.* if less than two-thirds approve, the treaty falls to the ground. Its judicial function is to sit as a court for the trial of impeachments preferred by the House of Representatives.

The most conspicuous, and what was at one time deemed the most important feature of the Senate, is that it represents the several States of the Union as separate commonwealths, and is thus an essential part of the Federal scheme. Every State, be it as great as New York or as small as Delaware, sends two senators, no more and no less.[2] This arrangement was long resisted by the delegates of the larger States in the Convention of 1787, and ultimately adopted because nothing less would reassure the smaller States, who feared to be

[1] To avoid prolixity, I do not give in the text all the details of the constitutional powers and duties of the Houses of Congress: these will be found in the text of the Constitution printed in the Appendix.

[2] New York is twice as large as Scotland, and as populous as Scotland, Northumberland, and Durham taken together. Delaware is a little smaller than Norfolk, with about the population of Bedfordshire. It is therefore as if Bedfordshire had in one House of a British legislature as much weight as all Scotland together with Northumberland and Durham, a state of things not very conformable to democratic theory. Nevada has now a population about equal to that of Caithness (40,000), but is as powerful in the Senate as New York. This State, which consists of burnt-out mining camps, is really a sort of rotten borough for and controlled by the great "silver men."

overborne by the larger. It is now the provision of the Constitution most difficult to change, for "no State can be deprived of its equal suffrage in the Senate without its consent," a consent most unlikely to be given. There has never, in point of fact, been any division of interests or consequent contest between the great States and the small ones.[1] But the provision for the equal representation of all States had the important result of making the slave-holding party, during the thirty years which preceded the Civil War, eager to extend the area of slavery in order that by creating new Slave States they might maintain at least an equality in the Senate, and thereby prevent any legislation hostile to slavery.

The plan of giving representatives to the States as commonwealths has had several useful results. It has provided a basis for the Senate unlike that on which the other House of Congress is chosen. Every nation which has formed a legislature with two houses has experienced the difficulty of devising methods of choice sufficiently different to give a distinct character to each house. Italy has a Senate composed of persons nominated by the Crown. The Prussian House of Lords is partly nominated, partly hereditary, partly elective. The Spanish senators are partly hereditary, partly official, partly elective. In the Germanic Empire, the Federal Council consists of delegates of the several kingdoms and principalities. France appoints her senators by indirect election. In England the members of the House of Lords now sit by hereditary right; and those who propose to reconstruct that ancient body are at their wits' end to discover some plan by which it may be strengthened, and made practically useful, without

[1] Hamilton perceived that this would be so; see his remarks in the Constitutional Convention of New York in 1788.—Elliot's *Debates*, p. 213.

such a direct election as that by which members are chosen to the House of Commons.[1] The American plan, which is older than any of those in use on the European continent, is also better, because it is not only simple, but natural, *i.e.* grounded on and consonant with the political conditions of America. It produces a body which is both strong in itself and different in its collective character from the more popular house.

It also constitutes, as Hamilton anticipated, a link between the State Governments and the National Government. It is a part of the latter, but its members derive their title to sit in it from their choice by State legislatures. In one respect this connection is no unmixed benefit, for it has helped to make the national parties powerful, and their strife intense, in these last-named bodies. Every vote in the Senate is so important to the great parties that they are forced to struggle for ascendency in each of the State legislatures by whom the senators are elected. The method of choice in these bodies was formerly left to be fixed by the laws of each State, but as this gave rise to much uncertainty and intrigue, a Federal statute was passed in 1866 providing that each House of a State legislature shall first vote separately for the election of a Federal senator, and that if the choice of both Houses shall not fall on the same person, both Houses in joint meeting shall proceed to a joint vote, a majority of each House being present. Even under this arrangement, a senatorial election often leads to long and bitter struggles; the minority endeavouring to prevent a choice, and so keep the seat

[1] Under a recent statute, two persons may be appointed by the Crown to sit in the House of Lords as Lords of Appeal, with the dignity of baron for life. The Scotch and Irish peers enjoy hereditary peerages, but are elected to sit in the House of Lords, the latter for life, the former for each parliament.

vacant. Quite recently in Illinois, Indiana, and New Jersey, the legislatures fought for months together over the election of a senator.

The method of choosing the Senate by indirect election has excited the admiration of foreign critics, who have found in it a sole and sufficient cause of the excellence of the Senate as a legislative and executive authority. I shall presently inquire whether the critics are right. Meantime it is worth observing that the election of senators has in substance almost ceased to be indirect. They are still nominally chosen, as under the letter of the Constitution they must be chosen, by the State legislatures. The State legislature means, of course, the party for the time dominant, which holds a party meeting (caucus) and decides on the candidate, who is thereupon elected, the party going solid for whomsoever the majority has approved. Now the determination of the caucus has almost always been arranged beforehand by the party managers. Sometimes when a vacancy in a senatorship approaches, the aspirants for it put themselves before the people of the State. Their names are discussed at the State party convention held for the nomination of party candidates for State offices, and a vote in that convention decides who shall be the party nominee for the senatorship. This vote binds the party within and without the State legislature, and at the election of members for the State legislature, which immediately precedes the occurrence of the senatorial vacancy, candidates for seats in that legislature are generally expected to declare for which aspirant to the senatorship they will, if elected, give their votes.[1]

[1] The Constitution of the State of Nebraska (1875) allows the electors in voting for members of the State legislature to "express by ballot their preference for some person for the office of U.S. senator. The votes cast for such candidates shall be canvassed and returned in the same manner

Sometimes the aspirant, who is of course a leading State politician, goes on the stump in the interest of those candidates for the legislature who are prepared to support him, and urges his own claims while urging theirs.[1] I do not say that things have, in all States, gone so far as to make the choice by the legislature of some particular person as senator a foregone conclusion when the legislature has been elected. Circumstances may change; compromises may be necessary; still, it is now generally true that in most States little freedom of choice remains with the legislature. The people, or rather those wire-pullers who manage the people and act in their name, have practically settled the matter at the election of the State legislature. So hard is it to make any scheme of indirect election work according to its original design; so hard is it to keep even a written and rigid constitution from bending and warping under the actual forces of politics.[2]

as for State officers." This is an attempt to evade and by a side wind defeat the provision of the Federal Constitution which vests the choice in the legislature.

[1] This happened recently in Nebraska, and seems to be not uncommon. The famous struggle of Mr. Douglas and Mr. Lincoln for the Illinois senatorship in 1858 was conducted in a stump campaign.

[2] A proposal recently made to amend the Federal Constitution by taking the election of senators away from the legislatures in order to vest it in the people of each State is approved by some judicious publicists, who think that bad candidates will have less chance with the party at large and the people than they now have in bodies apt to be controlled by a knot of party managers. A nomination made for a popular election will at least be made publicly, whereas now a nomination for an election by a legislature may be made secretly. I subjoin the form which this proposal took in 1881 as a specimen of the form in which amendments to the Constitution may be submitted to Congress.

46th Congress, 3rd Session. IN THE HOUSE OF REPRESENTATIVES, 31*st January* 1881.

Read twice, referred to the Committee on the Judiciary, and ordered to be printed.

Mr. Weaver introduced the following joint resolution:—

Members of the Senate vote as individuals, that is to say, the vote a senator gives is his own and not that of his State. It was otherwise in the Congress of the old Confederation before 1789; it is otherwise in the present Federal Council of the German Empire, in which each State votes as a whole, though the number of her votes is proportioned to her population. Accordingly, in the American Senate, the two senators from a State may belong to opposite parties; and this often happens in the case of senators from States in which the two great parties are pretty equally balanced, and the majority oscillates between them.[1] Suppose Ohio to have to elect a senator in 1886. The Democrats have a majority in the State legislature; and a Democrat is therefore chosen senator. In 1888 the other Ohio senatorship falls vacant. But by this time the balance of parties in Ohio has shifted. The Republicans control

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States, providing for the election of Senators by vote of the people.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following is hereby proposed as an amendment to the Constitution of the United States, and when ratified by the Legislatures of three-fourths of the several States, shall be valid to all intents and purposes as a part of the Constitution, to wit:—

Article—

That so much of section third, article first, of the Constitution of the United States as provides that the Senators of the United States shall be chosen by the Legislatures thereof shall be amended so that the same shall read as follows:—

"The Senate of the United States shall be composed of two Senators from each State, to be chosen by the vote of the qualified electors in said States respectively, and at such time as shall be determined by Act of Congress."

Similar proposals have been repeatedly made in subsequent Congresses, but never accepted by either House.

[1] It was arranged from the beginning of the Federal Government that the two senatorships from the same State should never be vacant at the same time.

the legislature; a Republican senator is therefore chosen, and goes to Washington to vote against his Democratic colleague. This fact has largely contributed to render the senators independent of the State legislatures, for as these latter bodies sit for short terms (the larger of the two Houses usually for two years only), a senator has during the greater part of his six years' term to look for re-election not to the present but to a future State legislature.[1]

The length of the senatorial term was one of the provisions of the Constitution which were most warmly attacked and defended in 1788. A six years' tenure, it was urged, would turn the senators into dangerous aristocrats, forgetful of the legislature which had appointed them; and some went so far as to demand that the legislature of a State should have the right to recall its senators.[2] Experience has shown that the term is by no means too long; and its length is one among the causes which have made it easier for senators than for members of the House to procure re-election, a result which, though it offends the doctrinaires of democracy, has worked well for the country. Senators from the smaller States are more frequently re-elected than those from the larger, because in the small States the competition of ambitious men is less keen, politics less changeful, the people perhaps more steadily attached to

[1] If a vacancy occurs in a senatorship at a time when the State legislature is not sitting, the executive of the State is empowered to fill it up until the next meeting of the State legislature. This is sometimes an important power, especially if the vacancy occurs at a time when parties are equally divided in the Senate.

[2] This was recommended by a Pennsylvanian Convention, which met after the adoption of the Constitution to suggest amendments. See Elliot's *Debates*, ii. p. 545. It was also much pressed by some members of the New York Convention. A State legislature sometimes passes resolutions instructing its senators to vote in a particular way, but the senators are of course in no way bound to regard such instructions.

a man whom they have once honoured with their confidence. The senator from such a State generally finds it more easy to maintain his influence over his own legislature; not to add that if the State should be amenable to the power of wealth, his wealth will tell for more than it could in a large State. Yet no small State was ever more controlled by one man than the great State of Pennsylvania by Mr. Simon Cameron, who represented it for eighteen years. In recent times it is the senators from the small States, such as Rhode Island, Vermont, and Delaware, who have been most frequently re-elected. The average age of the Senate is less than might be expected. Three-fourths of its members are under sixty. The importance of the State he represents makes no great difference to the influence which a senator enjoys; this depends on his talents, experience, and character; and as the small State senators have often the advantage of long service and a safe seat, they are often among the most influential.

The Senate resembles the Upper Houses of Europe, and differs from those of the British colonies, and of most of the States of the Union, in being a permanent body. It does not change all at once, as do bodies created by a single popular election, but undergoes an unceasing process of gradual change and renewal, like a lake into which streams bring fresh water to replace that which the issuing river carries out. This provision was designed to give the Senate that permanency of composition which might qualify it to conduct or control the foreign policy of the nation.[1] An incidental and more valuable result has been the creation of a set of traditions and a corporate spirit which have tended

[1] See *Federalist*, No. lxi., and Hamilton's argument in the New York State Convention. Elliot's *Debates*, vol. ii. p. 307.

to form habits of dignity and self-respect. The new senators, being always in a minority, are readily assimilated; and though the balance of power shifts from one party to another according to the predominance in the State legislatures of one or other party, it shifts more slowly than in bodies directly chosen all at once, and a policy is therefore less apt to be suddenly reversed.

The legislative powers of the Senate being, except in one point, the same as those of the House of Representatives, will be described later. That one point is a restriction as regards money bills. On the ground that it is only by the direct representatives of the people that taxes ought to be levied, and in obvious imitation of the venerable English doctrine, which had already found a place in several State constitutions, the Constitution (Art. i. § 7) provides that "All bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments, as on other bills." In practice, while the House strictly guards its right of origination, the Senate largely exerts its power of amendment, and wrangles with the House over taxes, and still more keenly over appropriations. Almost every session ends with a dispute, a conference, a compromise. The system of committees, which is the most remarkable feature of the Senate's legislative procedure, will be considered in a subsequent chapter, while a note to the present chapter[1] presents an abstract of some of the more noteworthy of its rules. Among those rules there is none providing for a closure of debate, or limiting the length either of a debate or of a speech. The Senate is proud of having conducted its business without the aid of such

[1] This note will be found at the end of this volume.

regulations, and this has been due, not merely to the small size of the assembly, but to the sense of its dignity which has usually pervaded its members, and to the power which the opinion of the whole body has exercised on each. Where every man knows his colleagues intimately, each, if he has a character to lose, stands in awe of the others, and has so strong a sense of his own interest in maintaining the moral authority of the Chamber, that he is slow to resort to extreme methods which might lower it in public estimation. Till recently, systematic obstruction, or, as it is called in America, "filibustering," familiar to the House, was almost unknown in the calmer air of the Senate. When it was applied some years ago by the Democratic senators to stop a bill to which they strongly objected, their conduct was not disapproved by the country, because the whole party, a minority very little smaller than the Republican majority, supported it, and people believed that nothing but some strong reason would have induced the whole party so to act. Accordingly the majority yielded. Although the increased size of the body makes the despatch of business more difficult than formerly, it is hardly likely that the Senate will adopt any regulation limiting debate, for it prides itself on its traditions, and likes to mark the contrast between its own good manners and the turbulence of the more numerous House. In the winter session of 1883, the rules of procedure were subjected to a thorough revision, but no proposal of this nature was made.

Divisions are taken, not by separating the senators into lobbies and counting them, as in the British Parliament, but by calling the names of senators alphabetically. The Constitution provides that one-fifth of those

present may demand that the Yeas and Nays be entered in the journal. Every senator answers to his name with Aye or No. He may, however, ask the leave of the Senate to abstain from voting; and if he is paired, he states, when his name is called, that he has paired with such and such another senator, and is therefore excused. No one is permitted to speak more than twice to the same question on the same day.

When the Senate goes into executive session, the galleries are cleared and the doors closed, and the obligation of secrecy is supposed to be enforced by the penalty of expulsion to which a senator, disclosing confidential proceedings, makes himself liable. Practically, however, newspaper men find little difficulty in ascertaining what passes in secret session.[1] The threatened punishment has never been inflicted, and occasions often arise when senators feel it to be desirable that the public should know what their colleagues have been doing. There has been for some time past a movement within the Senate against maintaining secrecy, particularly with regard to the confirming of nominations to office; and there is also a belief in the country that publicity would make for purity. But while some of the black sheep of the Senate love darkness because their works are evil, other members of undoubted respectability defend the present system because they think it supports the power and dignity of their body.

[1] Secrecy is said to be better observed in the case of discussions on treaties than where appointments are in question. Some years ago a Western newspaper published an account of what took place in a secret session. A committee appointed to inquire into the matter questioned every senator. Each swore that he had not divulged the proceedings, and the newspaper people also swore that their information did not come from any Senator. Nothing could be ascertained, and nobody was punished.

CHAPTER XI

THE SENATE AS AN EXECUTIVE AND JUDICIAL BODY

THE Senate is not only a legislative but also an executive Chamber; in fact in its early days the executive functions seem to have been thought the more important; and Hamilton went so far as to speak of the national executive authority as divided between two branches, the President and the Senate. These executive functions are two, the power of approving treaties, and that of confirming nominations to office submitted by the President.

To what has already been said regarding the functions of the President and Senate as regards treaties (see above, Chapter VI.) I need only add that the Senate through its right of confirming or rejecting engagements with foreign powers, secures a general control over foreign policy. It is in the discretion of the President whether he will communicate current negotiations to it and take its advice upon them, or will say nothing till he lays a completed treaty before it. One or other course is from time to time followed, according to the nature of the case, or the degree of friendliness existing between the President and the majority of the Senate. But in general, the President's best policy is to keep the leaders of the senatorial majority,

and in particular the committee on Foreign Relations, informed of the progress of any pending negotiation. He thus feels the pulse of the Senate, and foresees what kind of arrangement he can induce it to sanction, while at the same time a good understanding between himself and his coadjutors is promoted. It is well worth his while to keep the Senate in good humour, for, like other assemblies, it has a collective self-esteem which makes it seek to gain all the information and power it can draw in. The right of going into secret session enables the whole Senate to consider despatches communicated by the President; and the more important ones, having first been submitted to the Foreign Relations committee, are thus occasionally discussed without the disadvantage of publicity. Of course no momentous secret can be long kept, even by the committee, according to the proverb in the Elder Edda—"Tell one man thy secret, but not two; if three know, the world knows."

This control of foreign policy by the Senate goes far to meet that terrible difficulty which a democracy, or indeed any free government, finds in dealing with foreign Powers. If every step to be taken must be previously submitted to the governing assembly, the nation is forced to show its whole hand, and precious opportunities of winning an ally or striking a bargain may be lost. If on the other hand the executive is permitted to conduct negotiations in secret, there is always the risk, either that the governing assembly may disavow what has been done, a risk which makes foreign states legitimately suspicious and unwilling to negotiate, or that the nation may have to ratify, because it feels bound in honour by the act of its executive agents, arrangements which its judgment condemns.

The frequent participation of the Senate in negotiations diminishes these difficulties, because it apprises the executive of what the judgment of the ratifying body is likely to be, and it commits that body by advance. The necessity of ratification by the Senate in order to give effect to a treaty, enables the country to retire from a doubtful bargain, though in a way which other Powers find disagreeable, as England did when the Senate rejected the Reverdy Johnson treaty of 1869. European statesmen may ask what becomes under such a system of the boldness and promptitude so often needed to effect a successful *coup* in foreign policy, or how a consistent attitude can be maintained if there is in the chairman of the Foreign Relations committee a sort of second foreign secretary. The answer is that America is not Europe. The problems which the Foreign Office of the United States has to deal with are far fewer and usually far simpler than those of the Old World. The republic keeps consistently to her own side of the Atlantic; nor is it the least of the merits of the system of senatorial control that it has tended, by discouraging the executive from schemes which may prove resultless, to diminish the taste for foreign enterprises, and to save the country from being entangled with alliances, protectorates, responsibilities of all sorts beyond its own frontiers. It is the easier for the Americans to practise this reserve because they need no alliances, standing unassailable in their own hemisphere. The circumstances of England, with her powerful European neighbours, her Indian Empire, and her colonies scattered over the world, are widely different. Yet different as the circumstances of England are, the day may come when in England the question of limiting the at present all but unlimited discretion of the

executive in foreign affairs will have to be dealt with;[1] and the example of the American Senate will then deserve and receive careful study. Yet it must be remembered that many of the most important acts done in the sphere of foreign relations are purely executive acts (as for instance, the movement of troops and ships) which the Senate cannot control.

The Senate may and occasionally does amend a treaty, and return it amended to the President. There is nothing to prevent it from proposing a draft treaty to him, or asking him to prepare one, but this is not the practice. For ratification a vote of two-thirds of the senators present is required. This gives great power to a vexatious minority, and increases the danger, evidenced by several incidents in the history of the Union, that the Senate or a faction in it may deal with foreign policy in a narrow, sectional, electioneering spirit. When the interest of any group of States is, or is supposed to be, opposed to the making of a given treaty, that treaty may be defeated by the senators from those States. They tell the other senators of their own party that the prospects of the party in the district of the country whence they come will be improved if the treaty is rejected and a bold aggressive line is taken in further negotiations. Some of these senators, who care more for the party than for justice or the common interests of the country, rally to the cry, and all the more gladly if their party is opposed to the

[1] Parliament may of course interfere, and sometimes does interfere; but the parliamentary majority which supports the ministry of the day usually (and probably wisely) forbears to press the Foreign Office for information which it is declared to be undesirable to furnish.

In 1886 a resolution was all but carried in the House of Commons, desiring all treaties to be laid before Parliament for its approval before being finally concluded.

President in power, because in defeating the treaty they humiliate his administration. Supposing their party to command a majority, the treaty is probably rejected, and the settlement of the question at issue perhaps indefinitely postponed. It may be thought that the party acting so vexatiously will suffer in public esteem. This happens in extreme cases; but the public are usually so indifferent to foreign affairs, and so little skilled in judging of them, that offences of the kind I have described may be committed with practical impunity. It is harder to fix responsibility on a body of senators than on the executive; and whereas the executive has usually an interest in settling diplomatic troubles, whose continuance it finds annoying, the Senate has no such interest, but is willing to keep them open so long as there is a prospect of sucking some political advantage out of them. The habit of using foreign policy for electioneering purposes is not confined to America. We have seen it in England, we have seen it in France, we have seen it even in monarchical Germany. But in America the treaty-confirming power of the Senate opens a particularly easy and tempting door to such practices.

The other executive function of the Senate, that of confirming nominations submitted by the President, has been discussed in the chapter on the powers of that officer. It is there explained how senators have used their right of confirmation to secure for themselves a huge mass of Federal patronage, and how by means of this right, a majority hostile to the President can thwart and annoy him. Quite recently a patronage dispute arose between President Cleveland and the Republican majority in the Senate. They required the President to send to the Senate along with each nomination to a

place vacant by the removal of the previous holder, not only a statement of reasons for the removal, but all the papers in the possession of the executive relating to the matter. The President seems to have been willing to state his reasons, while denying the legal right of the Senate to require them, but he refused to transmit such documents as he deemed confidential. The Senate complained and passed resolutions, but had of course no power to compel the President's compliance. It was suggested by some senators that the true remedy for improper removals from partisan motives would be that the Senate should discuss nominations publicly, instead of, as now, in secret executive session. This would be the best way of putting the President in the wrong, if he made bad nominations, and of putting the Senate in the right if it refused to confirm nominations where no adequate ground for the removal of the prior incumbent had been shown. Public discussion certainly seems the plan most conformable to a democratic government; and a European observer is surprised that American opinion allows such important business to be transacted with closed doors.

Does the control of the Senate operate to prevent abuses of patronage by the President? To some extent it does, yet less completely than could be wished. When the majority belongs to the same party as the President, appointments are usually arranged, or to use a familiar expression, "squared," between them, with a view primarily to party interests. When the majority is opposed to the President, they are tempted to agree to his worst appointments, because such appointments discredit him and his party with the country, and become a theme of hostile comment in the next electioneering campaign. As the initiative is his, it is the

nominating President, and not the confirming Senate, whom public opinion will condemn. These things being so, it may be doubted whether this executive function of the Senate is now a valuable part of the Constitution. It was designed to prevent the President from making himself a tyrant by filling the great offices with his accomplices or tools. That danger has passed away, if it ever existed; and Congress has other means of muzzling an ambitious chief magistrate. The more fully responsibility for appointments can be concentrated upon him, and the fewer the secret influences to which he is exposed, the better will his appointments be. On the other hand, it must be admitted that the participation of the Senate causes in practice less friction and delay than might have been expected from a dual control. The appointments to the cabinet offices are confirmed as a matter of course. Those of diplomatic officers are seldom rejected. "Little tiffs" are frequent when the senatorial majority is in opposition to the executive, but the machinery, if it does not work smoothly, works well enough to carry on the ordinary business of the country.

The judicial function of the Senate is to sit as a High Court for the trial of persons impeached by the House of Representatives. The chief justice of the United States presides, and a vote of two-thirds of the senators voting is needed for a conviction. Of the process, as affecting the President, I have spoken in Chapter V. It is applicable to other officials, including Federal judges. Besides President Johnson, six persons in all have been impeached, viz.:—

Four Federal judges, of whom two were acquitted, and two convicted, one for habitual drunkenness, and the other for having joined the Secessionists of 1861.

We shall see presently that impeachment is the only means by which a Federal judge can be got rid of.

One senator, who was acquitted for want of jurisdiction, the Senate deciding that a senatorship is not a "civil office" within the meaning of Art. iii. § 4 of the Constitution.

One minister, a secretary of war, who resigned before the impeachment was actually preferred, and escaped on the ground that being a private person he was not impeachable.

Rare as this method of proceeding is, it could not be dispensed with, and it is better that the Senate should try cases in which a political element is usually present, than that the impartiality of the Supreme court should be exposed to the criticism it would have to bear, did political questions come before it. Most senators are or have been lawyers of eminence, so that so far as legal knowledge goes they are competent members of a court.

CHAPTER XII

THE SENATE: ITS WORKING AND INFLUENCE

THE Americans consider the Senate one of the successes of their Constitution, a worthy monument of the wisdom and foresight of its founders. Foreign observers have repeated this praise, and have perhaps, in their less perfect knowledge, sounded it even more loudly.

The aims with which the Senate was created, the purposes it was to fulfil, are set forth, under the form of answers to objections, in five letters (lxi.-lxv.), all by Alexander Hamilton, in the *Federalist*.[1] These aims were the five following:—

To conciliate the spirit of independence in the several States, by giving each, however small, equal representation with every other, however large, in one branch of the national government.

To create a council qualified, by its moderate size and the experience of its members, to advise and check the President in the exercise of his powers of appointing to office and concluding treaties.

To restrain the impetuosity and fickleness of the popular House, and so guard against the effects of gusts of passion or sudden changes of opinion in the people.

[1] See also Hamilton's speeches in the New York Convention.—Elliot's *Debates*, ii. p. 301 *sqq.*

To provide a body of men whose greater experience, longer term of membership, and comparative independence of popular election, would make them an element of stability in the government of the nation, enabling it to maintain its character in the eyes of foreign States, and to preserve a continuity of policy at home and abroad.

To establish a Court proper for the trial of impeachments, a remedy deemed necessary to prevent abuse of power by the executive.

All of these five objects have been more or less perfectly attained; and the Senate has acquired a position in the government of the nation which Hamilton scarcely ventured to hope for. In 1788 he wrote: "Against the force of the immediate representatives of the people nothing will be able to maintain even the constitutional authority of the Senate, but such a display of enlightened policy, and attachment to the public good, as will divide with the House of Representatives the affections and support of the entire body of the people themselves."

It may be doubted whether the Senate has excelled the House in attachment to the public good; but it has certainly shown greater capacity for managing the public business, and has won the respect, if not the affections, of the people, by its sustained intellectual power.

The *Federalist* did not think it necessary to state, nor have Americans generally realized, that this masterpiece of the Constitution-makers was in fact a happy accident. No one in the Convention of 1787 set out with the idea of such a Senate as ultimately emerged from their deliberations. It grew up under the hands of the Convention, as the result of the necessity for reconciling the conflicting demands of the large and the small States. The concession of equal repre-

sentation in the Senate induced the small States to accept the principle of representation according to population in the House of Representatives; and a series of compromises between the advocates of popular power, as embodied in the House, and those of monarchical power, as embodied in the President, led to the allotment of attributes and functions which have made the Senate what it is. When the work which they had almost unconsciously perfected was finished, the leaders of the Convention perceived its excellence, and defended it by arguments in which we feel the note of sincere conviction. Yet the conception they formed of it differed from the reality which has been evolved. Although they had created it as a branch of the legislature, they thought of it as being first and foremost a body with executive functions. And this, at first, it was. The traditions of the old Congress of the Confederation, in which the delegates of the States voted by States, the still earlier traditions of the executive councils, which advised the governors of the colonies while still subject to the British Crown, clung about the Senate and affected the minds of the senators.[1] It was a small body, originally of twenty-six, even in 1810 of thirty-four members only, a body not ill fitted for executive work. Its members, regarding themselves as a sort of congress of ambassadors from their respective States, were accustomed to refer for advice and instructions each to his State legislature. So late as 1828, a senator after arguing strongly against a measure declared that he would nevertheless vote for it, because he believed his State to be in its favour. For the first five years of its existence, the Senate sat with closed doors,

[1] See upon this point the acute remarks of M. Boutmy, *Études de Droit Constitutionel* (Paris 1885), p. 118 *sqq.*

occupying itself chiefly with the confidential business of appointments and treaties, and conferring in private with the ministers of the President. Not till 1816 did it create, in imitation of the House, those Standing Committees which the experience of the House had shown to be, in bodies where the executive ministers do not sit, the necessary organs for dealing with legislative business. Its present character as a legislative body, not less active and powerful than the other branch of Congress, is the result of a long process of evolution, a process possible (as will be more fully explained hereafter) even under the rigid Constitution of the United States, because the language of the sections which define the competence of the Senate is very wide and general. But in gaining legislative authority, it has not lost its executive functions, although those which relate to treaties are largely exercised on the advice of the standing Committee on Foreign Relations. And as respects these executive functions it stands alone in the world. No European state, no British colony, entrusts to an elective assembly that direct participation in executive business which the Senate enjoys.

What is meant by saying that the Senate has proved a success?

It has succeeded by effecting that chief object of the Fathers of the Constitution, the creation of a centre of gravity in the government, an authority able to correct and check on the one hand the "democratic recklessness" of the House, on the other the "monarchical ambition" of the President. Placed between the two, it is necessarily the rival and generally the opponent of both. The House can accomplish nothing without its concurrence. The President can be checkmated by its

resistance. These are, so to speak, negative or prohibitive successes. It has achieved less in the way of positive work, whether of initiating good legislation or of improving the measures which the House sends it. But the whole scheme of the American Constitution tends to put stability above activity, to sacrifice the productive energies of the bodies it creates to their power of resisting changes in the general fabric of the government. The Senate has succeeded in making itself eminent and respected. It has drawn the best talent of the nation, so far as that talent flows to politics, into its body, has established an intellectual supremacy, has furnished a vantage ground from which men of ability may speak with authority to their fellow-citizens.

To what causes are these successes to be ascribed? Hamilton assumed that the Senate would be weaker than the House of Representatives, because it would not so directly spring from, speak for, be looked to by, the people. This was a natural view, especially as the analogy between the position of the Senate towards the House of Representatives in America, and that of the House of Lords towards the House of Commons in Great Britain, an analogy constantly present to the men of 1787, seemed to suggest that the larger and more popular chamber must dwarf and overpower the smaller one. But the Senate has proved no less strong, and morally more influential, than its sister House of Congress. The analogy was unsound, because the British House of Lords is hereditary and the Senate representative. In these days no hereditary assembly, be its members ever so able, ever so wealthy, ever so socially influential, can speak with the authority which belongs to those who speak for the people. Mirabeau's

famous words in the Salle des Menus at Versailles, "We are here by the will of the people, and nothing but bayonets shall send us hence," express the whole current of modern feeling; though it is only to-day that the belated political philosophers of England are awakening to perceive that the fault of their House of Lords is not that it is too strong, but that it is too weak, and that no assembly can now be strong unless it is representative. Now the Senate, albeit not chosen by direct popular election, does represent the people; and what it may lose through not standing in immediate contact with the masses, it gains in representing such ancient and powerful commonwealths as the States. A senator from New York or Pennsylvania speaks for, and is responsible to, millions of men. No wonder he has an authority beyond that of the long-descended nobles of Prussia, or the peers of England whose possessions stretch over whole counties.

This is the first reason for the strength of the Senate, as compared with the upper chambers of other countries. It is built on a wide and solid foundation of choice by the people and consequent responsibility to them. A second cause is to be found in its small size. A small body educates its members better than a large one, because each member is of more consequence, has more to do, sooner masters the business not only of his committee but of the whole body, feels a livelier sense of the significance of his own action in bringing about collective action. There is less disposition to abuse the freedom of debate. Party spirit may be as intense as in great assemblies, yet it is mitigated by the disposition to keep on friendly terms with those whom, however much you may dislike them, you have constantly to meet, and by the feeling of a common interest in

sustaining the authority of the body. A senator soon gets to know each of his colleagues—they were originally only twenty-five—and what each of them thinks of him; he becomes sensitive to their opinion; he is less inclined to pose before them, however he may pose before the public. Thus the Senate formed, in its childhood, better habits in discussing and transacting its business than could have been looked for in a large assembly; and these habits its maturer age retains. Its comparative permanence has also worked for good. Six years, which seem a short term in Europe,[1] are in America a long term when compared with the two years for which the House of Representatives and the Assemblies of nearly all the States are elected, long also when compared with the swiftness of change in American politics. A senator has the opportunity of thoroughly learning his work, and of proving that he has learnt it. He becomes slightly more independent of his constituency,[2] which in America, where politicians catch at every passing breeze of opinion, is a clear gain. He is relieved a little, though only a little, of the duty of going on the stump in his State, and maintaining his influence among local politicians there.

The smallness and the permanence of the Senate have however another important influence on its character. They contribute to one main cause of its success, the superior intellectual quality of its members. Every European who has described it, has dwelt upon

[1] Seven years are the full legal, and four to five years in practice the average, duration of a British House of Commons.

[2] A few years ago, for instance, Mr. Justice Lamar, then senator for Mississippi, having incurred the displeasure of some leading local politicians, took the field in his State, and succeeded in convincing the people that he was right, and in securing his re-election.

the capacity of those who compose it, and most have followed De Tocqueville in attributing this capacity to the method of double election. The choice of senators by the State legislatures is supposed to have proved a better means than direct choice by the people of discovering and selecting the fittest men. I have already remarked that practically the election of senators has become a popular election, the function of the legislatures being now little more than to register and formally complete a choice already made by the party managers, and perhaps ratified in the party convention. But apart altogether from this recent development, and reviewing the whole hundred years' history of the Senate, the true explanation of its intellectual capacity is to be found in the superior attraction which it has for the ablest and most ambitious men. A senator has more power than a member of the House, more dignity, a longer term of service, a more independent position. Hence every Federal politician aims at a senatorship, and looks on the place of representative as a stepping-stone to what is in this sense an Upper House, that it is the House to which representatives seek to mount. It is no more surprising that the average capacity of the Senate should surpass that of the House, than that the average cabinet minister of Europe should be abler than the average member of the legislature.

What is more, the Senate so trains its members as to improve their political efficiency. Several years of service in a small body, with important and delicate executive work, are worth twice as many years of jostling in the crowd of representatives at the other end of the Capitol. If the Senate does not find the man who enters it already superior to the average of Federal politicians, it makes him superior. But natural

selection, as has been said, usually seats upon its benches the best ability of the country that has flowed into political life, and would do so no less were the election in form a direct one by the people at the polls.

Most of the leading men of the last sixty years have sat in the Senate, and in it were delivered most of the famous speeches which illumine, though too rarely, the wearisome debates over State rights and slavery from 1825 till 1860. One of these debates, that in the beginning of 1830, which called forth Daniel Webster's majestic defence of the Constitution, was long called *par excellence* "the great debate in the Senate."[1]

Of the seventy-six senators who sat in the forty-eighth Congress (in 1884) 31 had sat in the other House of Congress, and 49 had served in State legislatures.[2] In the fiftieth Congress (1888) 29 had sat in the House of Representatives, and 49 in State legislatures. Many had been judges or State governors; many had sat in State conventions. Nearly all had held some public function. A man must have had considerable experience of affairs, and of human nature in its less engaging aspects, before he enters this august conclave. But experience is not all gain. Practice makes perfect in evil-doing no less than in well-doing. The habits of local politics and of work in the House of Representatives by which the senators have been trained, while they develop shrewdness and quickness in all characters, tell injuriously on characters

[1] In those days the Senate sat in that smaller chamber which is now occupied by the Supreme Federal Court.

[2] I cannot be sure of the absolute actual accuracy of these figures, which I have compiled from the *Congressional Directory*, because some senators do not set forth the whole of their political career. It is worth remarking that the proportion of senators who have previously been members of the House of Representatives is larger among the senators from the older States than it is in the south and west.

of the meaner sort, leaving men's views narrow, and giving them a taste as well as a talent for intrigue.

The chamber in which the Senate meets is semicircular in form, the Vice-President of the United States, who acts as presiding officer, having his chair on a marble dais, slightly raised, in the centre of the chord, with the senators all turned towards him as they sit in concentric semicircles, each in a morocco leather covered arm-chair, with a desk in front of it. The floor is about as large as the whole superficial area of the British House of Commons, but as there are great galleries on all four sides, running back over the lobbies, the upper part of the chamber and its total air-space much exceeds that of the English house. One of these galleries is appropriated to the President of the United States; the others to ladies, the press, and the public. Behind the senatorial chairs and desks there is an open space into which strangers can be brought by the senators, who sit and talk on the sofas there placed. Members of foreign legislatures are allowed access to this outer "floor of the Senate."[1] There is, especially when the galleries are empty, a slight echo in the room, which obliges most speakers to strain their voices. Two or three pictures on the walls somewhat relieve the cold tone of the chamber, with its marble platform and sides unpierced by windows, for the light enters through glass compartments in the ceiling.

A senator always addresses the Chair "Mr. President," and refers to other senators by their States, "The senator from Ohio," "The senator from Tennessee." When two senators rise at the same moment, the Chair

[1] A graceful courtesy has extended the privilege to the distinguished historian of the United States, Mr. George Bancroft, who still pursues in extreme old age his patriotic labours.

calls on one, indicating him by his State, "The senator from Minnesota has the floor."[1] Senators of the Democratic party sit, and apparently always have sat, on the right of the chair, Republican senators on the left; but, as already explained, the parties do not face one another. The impression which the place makes on a visitor is one of business-like gravity, a gravity which though plain is dignified. It has the air not so much of a popular assembly as of a diplomatic congress. The English House of Lords, with its fretted roof and windows rich with the figures of departed kings, its majestic throne, its Lord Chancellor in his wig on the woolsack, its benches of lawn-sleeved bishops, its bar where the Commons throng at a great debate, is not only more gorgeous and picturesque in externals, but appeals far more powerfully to the historical imagination, for it seems to carry the middle ages down into the modern world. The Senate is modern, severe, and practical. So, too, few debates in the Senate rise to the level of the better debates in the English chamber. But the Senate seldom wears that air of listless vacuity and superannuated indolence which the House of Lords presents on all but a few nights of every session. The faces are keen and forcible, as of men who have learned to know the world, and have much to do in it; the place seems consecrated to great affairs.

As might be expected from the small number of

[1] A late President of the Senate was in the habit of distinguishing the two senators from the State of Arkansas, by calling on one as the senator for "Arkansas" (pronounced as written, with accent on the penult), and the other as the Senator for "Arkansaw," with accent on the last syllable. As Europeans often ask which is the correct pronunciation, I may say that both are in common use. But the legislature of Arkansas has lately by a "joint resolution" declared "Arkansaw" to be right.

the audience, as well as from its character, discussions in the Senate are apt to be sensible and practical. Speeches are shorter and less fervid than those made in the House of Representatives, for the larger an assembly the more prone is it to declamation. The least useful debates are those on show-days, when a series of set discourses are delivered on some prominent question, because no one expects such discourses to have any persuasive effect. The question at issue is sure to have been already settled, either in a committee or in a "caucus" of the party which commands the majority, so that these long and sonorous harangues are mere rhetorical thunder addressed to the nation outside. The speakers, moreover, on such field days, seldom reply to the arguments of those who have preceded them, as men do in the English Parliament. Each senator brings down and fires off in the air, a carefully-prepared oration, which may have little bearing on what has gone before. In fact the speeches are made not to convince the assembly, for that no one dreams of doing, but to keep a man's opinions before the public and sustain his fame.[1]

The Senate now contains many men of great wealth. Some, an increasing number, are senators because they are rich; a few are rich because they are senators, while in the remaining cases the same talents which have won success in law or commerce have brought their possessor to the top in politics also. The great majority are or have been lawyers; some regularly practise before the Supreme Court. Complaints are occasionally levelled against the aristocratic tendencies which wealth is supposed to have bred, and sarcastic references are made to the sumptuous residences which senators have

[1] One is told in Washington that it is at present thought "bad form" for a senator to listen to a set speech; it implies that he is a freshman.

built on the new avenues of Washington. While admitting that there is more sympathy for the capitalist class among these rich men than there would be in a Senate of poor men, I must add that the Senate is far from being a class body like the upper houses of England or Prussia or Spain or Denmark. It is substantially representative, by its composition as well as by legal delegation, of all parts of American society; it is far too dependent, and far too sensible that it is dependent, upon public opinion, to dream of legislating in the interest of the rich. The senators, however, indulge some social pretensions. They are the nearest approach to an official aristocracy that has yet been seen in America. They and their wives are allowed precedence at private entertainments, as well as on public occasions, over members of the House, and of course over private citizens. Jefferson might turn in his grave if he knew of such an attempt to introduce European distinctions of rank into his democracy; yet as the office is temporary, and the rank vanishes with the office, these pretensions are harmless; it is only the universal social equality of the country that makes them noteworthy. Apart from such petty advantages, the position of a senator, who can count on re-election, is the most desirable in the political world of America. It gives as much power and influence as a man need desire. It secures for him the ear of the public. It is more permanent than the presidency or any great ministerial office, requires less labour, involves less vexation, though still great vexation, by importunate office-seekers.

European writers on America have been too much inclined to idealize the Senate. Admiring its structure and function, they have assumed that the actors must be worthy of their parts. They have been encouraged

in this tendency by the language of many Americans. As the Romans were never tired of repeating that the ambassador of Pyrrhus had called the Roman senate an assembly of kings, so Americans of refinement, who are ashamed of the turbulent House of Representatives, are wont to talk of the Senate as a sort of Olympian dwelling-place of statesmen and sages. It is nothing of the kind. It is a company of shrewd and vigorous men who have fought their way to the front by the ordinary methods of American politics, and on many of whom the battle has left its stains. There are abundant opportunities for intrigue in the Senate, because its most important business is done in the secrecy of committee rooms or of executive session; and many senators are intriguers. There are opportunities for misusing senatorial powers. Scandals have sometimes arisen from the practice of employing as counsel before the Supreme Court, senators whose influence has contributed to the appointment or confirmation of the judges.[1] There are opportunities for corruption and blackmailing, of which unscrupulous men are well known to take advantage. Such men are fortunately few; but considering how demoralized are the legislatures of several southern and western States, their presence must be looked for; and the rest of the Senate, however it may blush for them, is obliged to work with them and to treat them as equals.[2] The contagion of political vice is

[1] In the session of 1886, an Act was passed forbidding members of either House of Congress to appear in the Federal courts as counsel for any railroad company or other corporation which might, in respect of its having received land grants, be affected by Federal legislation. The Act originated in the Senate, which deserves in this instance the credit of seeking to cure its own faults, and remove temptation from the path of its weaker members.

[2] Americans now frequently accuse the Senate of timidity, and ascribe

nowhere so swiftly potent as in legislative bodies, because you cannot taboo a man who has got a vote. You may loathe him personally, but he is the people's choice. He has a right to share in the government of the country; you are grateful to him when he saves you on a critical division; you discover that "he is not such a bad fellow when one knows him"; people remark that he gives good dinners, or has an agreeable wife; and so it goes on till falsehood and knavery are covered under the cloak of party loyalty.

As respects ability, the Senate cannot be profitably compared with the English House of Lords, because that assembly consists of some twenty eminent and as many ordinary men attending regularly, with a multitude of undistinguished persons who, though members, are only occasional visitors, and take no real share in the deliberations. Setting the Senate beside the House of Commons, one may say that the average natural capacity of its seventy-six members is not above that of the seventy-six best men in the English House. There is more variety of talent in the latter, and a greater breadth of culture. On the other hand, the Senate excels in legal knowledge as well as in practical shrewdness. The House of Commons contains more men who could give a good address on a literary

this fault to the fact that many of its members, being persons of great wealth but no great independence, are nervously alive to the fear of being thought deficient in popular sympathies. Recently when a proposal was made to bring the Federal army up to its nominal strength, 25,000 men, no extreme figure, the threat of one member that the working classes would think the army was being increased in order to be used by capital against labour, is said to have caused so much alarm that the plan was hastily dropped. So far as a stranger can judge, there is certainly less respect for the Senate collectively, and for most of the senators individually, now than there was eighteen years ago, though, of course, there are among its members men of an ability and character which would do honour to any assembly.

or historical subject, the Senate more who could either deliver a rousing popular harangue or manage the business of a great trading company, these being the forms of capacity commonest among congressional politicians. The fairest judgment I know on the Senate's merits is contained in the following extract from an acute American writer, who says (writing in 1885):

"The Senate is just what the mode of its election and the conditions of public life in this country make it. Its members are chosen from the ranks of active politicians, in accordance with a law of natural selection to which the State legislatures are commonly obedient; and it is probable that it contains, consequently, the best men that our system calls into politics. If these best men are not good, it is because our system of government fails to attract better men by its prizes, not because the country affords or could afford no finer material. The Senate is in fact, of course, nothing more than a part, though a considerable part, of the public service; and if the general conditions of that service be such as to starve statesmen and foster demagogues, the Senate itself will be full of the latter kind, simply because there are no others available. There cannot be a separate breed of public men reared specially for the Senate. It must be recruited from the lower branches of the representative system, of which it is only the topmost part. No stream can be purer than its sources. The Senate can have in it no better men than the best men of the House of Representatives; and if the House of Representatives attracts to itself only inferior talent, the Senate must put up with the same sort. Thus the Senate, though it may not be as good as could be wished, is as good as it can be under the circumstances. It contains the most perfect

product of our politics, whatever that product may be."[1]

The place which the Senate holds in the constitutional system of America cannot be fully appreciated till the remaining parts of that system have been described. This much, however, may be claimed for it, that it has been and is, on the whole, a steadying and moderating power. One cannot say in the language of European politics that it has represented aristocratic principles, or anti-popular principles, or even conservative principles. Each of the great historic parties has in turn commanded a majority in it, and the difference between their strength has during the last decade been but slight. On none of the great issues that have divided the nation has the Senate been, for any long period, decidedly opposed to the other House of Congress. It showed no more capacity than the House for grappling with the problems of slavery extension. It was scarcely less ready than the House to strain the Constitution by supporting Lincoln in the exercise of the so-called war powers, or subsequently by cutting down presidential authority in the struggle between Congress and Andrew Johnson. All the fluctuations of public opinion tell upon it, nor does it venture, any more than the House, to confront a popular impulse, because it is, equally with the House, subject to the control of the great parties, which seek to use while they obey the dominant sentiment of the hour.

But the fluctuations of opinion tell on it less energetically than on the House of Representatives. They reach it slowly and gradually, owing to the system which renews it by one-third every second year, so that it sometimes happens that before the tide has risen to the

[1] Woodrow Wilson, *Congressional Government*, pp. 194, 195.

top of the flood in the Senate it has already begun to ebb in the country. The Senate has been a stouter bulwark against agitation, not merely because a majority of the senators have always four years of membership before them, within which period public feeling may change, but also because the senators have been individually stronger men than the representatives. They are less democratic, not in opinion, but in temper, because they have more self-confidence, because they have more to lose, because experience has taught them how fleeting a thing popular sentiment is, and how useful a thing continuity in policy is. The Senate has therefore usually kept its head better than the House of Representatives. It has expressed more adequately the judgment, as contrasted with the emotion, of the nation. In this sense it does constitute a "check and balance" in the Federal government. Of the three great functions which the Fathers of the Constitution meant it to perform, the first, that of securing the rights of the smaller States, is no longer important, because the extent of State rights has been now well settled; while the second, that of advising or controlling the Executive in appointments as well as in treaties, has given rise to evils almost commensurate with its benefits. But the third duty is still well discharged, for "the propensity of a single and numerous assembly to yield to the impulse of sudden and violent passions" is restrained.

CHAPTER XIII

THE HOUSE OF REPRESENTATIVES

THE House of Representatives, usually called for shortness the House, represents the nation on the basis of population, as the Senate represents the States.

But even in the composition of the House the States play an important part. The Constitution provides[1] that "representatives and direct taxes shall be apportioned among the several States according to their respective numbers," and under this provision Congress allots so many members of the House to each State in proportion to its population at the last preceding decennial census, leaving the State to determine the districts within its own area for and by which the members shall be chosen. These districts are now equal or nearly equal in size; but in laying them out there is ample scope for the process called "gerrymandering,"[2]

[1] Constitution, Art. i. § 2, par. 3; cf. Amendment xiv. § 2.

[2] So called from Elbridge Gerry, a leading Democratic politician in Massachusetts (a member of the Constitutional Convention of 1787, and in 1812 elected Vice-President of the United States), who when Massachusetts was being re-districted contrived a scheme which gave one of the districts a shape like that of a lizard. A noted artist entering the room of an editor who had a map of the new districts hanging on the wall over his desk observed, "Why, this district looks like a salamander," and put in the claws and eyes of the creature with his pencil. "Say rather a Gerrymander," replied the editor; and the name stuck. The aim of gerrymandering, of course, is so to lay out the one-membered districts as to

which the dominant party in a State rarely fails to apply for its own advantage. Where a State legislature has failed to redistribute the State into congressional districts, after the State has received an increase of representatives, the additional member or members are elected by the voters of the whole State on a general ticket, and are called "representatives at large." Very recently one State (Maine) elected all its representatives on this plan, while another (Kansas) elected three by districts and four by general ticket. Each district, of course, lies wholly within the limits of one State. When a seat becomes vacant the governor of the State issues a writ for a new election, and when a member desires to resign his seat he does so by letter to the governor.

The original House which met in 1789 contained only sixty-five members, the idea being that there should be one member for every 30,000 persons. As population grew and new States were added, the number of members was increased. Originally Congress fixed the ratio of members to population, and the House accordingly grew; but latterly, fearing a too rapid increase, it has fixed the number of members with no regard for any precise ratio of members to population. At present the total number of representatives is 325, being, according to the census of 1880, one member to 154,325 souls. Four States, Colorado, Delaware, Nevada, and

secure in the greatest possible number of them a majority for the party which conducts the operation. This is done sometimes by throwing the greatest possible number of hostile voters into a district which is anyhow certain to be hostile, sometimes by adding to a district where parties are equally divided some place in which the majority of friendly voters is sufficient to turn the scale. There is a district in Mississippi (the so-called Shoe String district) 500 miles long by 40 broad, and another in Pennsylvania resembling a dumb-bell. South Carolina furnishes some beautiful recent examples. And in Missouri a district has been contrived longer, if measured along its windings, than the State itself, into which as large a number as possible of the negro voters have been thrown.

Oregon, have only one representative each; four others have two each; while New York has thirty-four, and Pennsylvania twenty-eight. Besides these full members there are also eight Territorial delegates, one from each of the Territories, regions in the West enjoying a species of self-government, but not yet formed into States. These delegates sit and speak, but have no right to vote, being unrecognized by the Constitution. They are, in fact, merely persons whom the House under a statute admits to its floor and permits to address it.

The electoral franchise on which the House is elected is for each State the same as that by which the members of the more numerous branch of the State legislature are chosen. Originally electoral franchises varied very much in different States: now a suffrage practically all but universal prevails everywhere. A State, however, has a right of limiting the suffrage as it pleases, and many States do exclude persons convicted of crime, paupers, illiterates, etc. By the fifteenth amendment to the Constitution (passed in 1870) "the right of citizens of the United States to vote shall not be denied or abridged by any State on account of race, colour, or previous condition of servitude," while by the fourteenth amendment (passed in 1868) "the basis of representation in any State is reduced in respect of any male citizens excluded from the suffrage, save for participation in rebellion or other crimes." Each State has therefore a strong motive for keeping its suffrage wide, but the fact remains that the franchise by which the Federal legislature is chosen may differ vastly, and does in some points actually differ in different parts of the Union.[1]

[1] Rhode Island still retains a certain small property qualification for electors, and in some States payment of a poll tax is made a condition to the exercise of electoral rights. See chapter on State Legislatures in Vol. II.

Members are elected for two years, and the election always takes place in the even years, 1884, 1886, 1888, and so forth. Thus the election of every second Congress coincides with that of a President; and admirers of the Constitution find in this arrangement another of their favourite "checks," because while it gives the incoming President a Congress presumably, though by no means necessarily, of the same political complexion as his own, it enables the people within two years to express their approval or disapproval of his conduct by sending up another House of Representatives which may support or oppose the policy he has followed. The House does not in the regular course of things meet until a year has elapsed from the time when it has been elected, though the President may convoke it sooner, *i.e.* a House elected in November 1888 will not meet till December 1889, unless the President summons it in "extraordinary session" some time after March 1889, when the previous House expires. This summons has been issued ten times only since 1789; and has so often brought ill luck to the summoning President that a sort of superstition against it has now grown up.[1] The question is often mooted whether a new Congress ought not by law to meet within six months after its election, for there are inconveniences in keeping an elected House unorganized and Speakerless for a twelvemonth. But the country is not so fond of Congress as to desire more of it. It is a singular result of the present arrangement that the old House continues to sit for nearly four months after the members of the new House have been elected.

[1] This ill luck is supposed (says Mr. Blaine in his *Twenty Years in Congress*) to attach especially to May sessions, which reminds one of the superstition against May marriages mentioned by John Knox apropos of the marriage of Mary Queen of Scots and Darnley.

The expense of an election varies greatly from district to district. Sometimes, especially in great cities where illegitimate expenditure is more frequent and less detectible than in rural districts, it rises to a sum of $10,000 (£2000) or more: sometimes it is trifling. No estimate of the average can be formed, because no returns of election expenses are required by law. I fancy that a seat costs, as a rule, less than one for a county division does in England.[1] A candidate, unless very wealthy, is not expected to pay the whole expense out of his own pocket, but is aided often by the local contributions of his friends, sometimes by a subvention from the election funds of the party in the State. Most of the expenditure is legitimate, that is to say, it goes in paying for meetings, in printing, in advertisements, in agency. All the official expenses, such as for clerks, polling booths, etc., are paid by the public. Bribery is not rare in the urban districts, nor in some of the country districts: but elections are seldom impeached on that ground, for the difficulty of proof is increased by the circumstance that the House, which is of course the investigating and deciding authority, does not meet till a year after the election. As a member is elected for two years only, and the investigation would probably drag on during the whole of the first session, it is scarcely worth while to dispute the return for the

[1] In England the Act 46 and 47 Vict. c. 51, Schedule I., fixes the maximum expenditure of a candidate, exclusive of personal expenses and returning officer's charges, as follows:—In a borough £380, and an additional £30 for every complete 1000 electors above 2000. In a county £710, and an additional £60 for every complete 1000 electors above 2000. Expenses at borough elections are usually below the legal maximum, in counties not so often. The average expenditure, all kinds of expense included, seems, in county constituencies, to be from £1100–£1200, and in boroughs from £400–£500.

sake of turning him out for the second session.[1] Systematic treating is uncommon. Sometimes in country places a voter who has come from a distance to vote, expects a free dinner, and no one complains if he gets it. In some States, drinking places are closed on the election day.

Among the members of the House there are few young men, and still fewer old men. The immense majority are between forty and sixty. Lawyers abound, including in that term both those who in Great Britain are called barristers or advocates, and those who are called attorneys, there being in America no distinction between these two branches of the profession. An analysis of the House in the fiftieth Congress, that of 1887-89, showed that two hundred and three members, or nearly two-thirds of the whole number, had been trained or had practised as lawyers. Of course many of these had practically dropped law as a business, and given themselves wholly to politics. Next in number come the men engaged in manufactures or commerce, in agriculture, or banking, or journalism, but no one of these occupations counted as many as forty members.[2] No military or naval officer, and no person

[1] That under these favouring conditions bribery is not common may be due to the great size of the congressional districts (average population of a district (1888) at least 160,000). Bribery sprang up in England when constituencies were small—it was far more rife in boroughs than in counties—and its disappearance of late years is probably due to the enormous enlargement of the constituencies as well as to the severe and searching provisions of the present law. At Rome, however, candidates used to bribe large numbers of electors; and I have heard of city districts in America in which thousands of electors were believed to have received a pecuniary consideration.

[2] In the fiftieth Congress the number of persons stating themselves to be engaged in commerce was 39, in agriculture 25. In the forty-eighth Congress there were 205 lawyers. I take these numbers from the *Congressional Directory*, which I have carefully analyzed, but as some members do not state their occupations, the analysis is not quite complete, and there are probably more lawyers than the number I have given.

in the civil service of the United States, can sit. Scarcely any of the great railway men go into Congress, a fact of much significance when one considers that they are really the most powerful people in the country; and of the numerous lawyer members very few are leaders of the bar in their respective States. The reason is the same in both cases. Residence in Washington makes practice at the bar of any of the great cities impossible, and men in lucrative practice would not generally sacrifice their profession in order to sit in the House, while railway managers or financiers are too much engrossed by their business to be able to undertake the duties of a member. The absence of railway men by no means implies the absence of railway influence, for it is as easy for a company to influence legislation from without Congress as from within.

Most members, including nearly all western men, have received their early education in the common schools, but one half or more of the whole number have also graduated in a university or college. This does not necessarily mean what it would mean in Europe, for some of the smaller colleges are no better than English grammar schools and not as good as German gymnasia. It is noticeable that in the accounts of their career which members prepare for the pages of the *Congressional Directory*, they usually dwell upon the fact of their graduation, or state that they have "received an academic education."[1] A good many, but apparently not the majority, have served in the legislature of their own State. Comparatively few are

[1] In the *Congressional Directory* for the fiftieth Congress I find 209 members claiming to have received a "collegiate" or "academic" education, 84 owning to an elementary or common school education, and the remainder silent on the subject.

wealthy, and few are very poor, while scarcely any were at the time of their election working men. Of course no one could be a working man while he sits, for he would have no time to spare for his trade, and the salary would more than meet his wants. Nothing prevents an artisan from being returned to Congress, but there seems little disposition among the working classes to send one of themselves.

A member of the House enjoys the title of Honourable, which is given to him not merely within the House (as in England), but in the world at large, as for instance in the addresses of his letters. As he shares it with members of State senates, all the higher officials, both Federal and State, and judges, the distinction is not deemed a high one.

An estimate of the powers of Congress as a whole belongs to a later chapter. As regards those of the House in particular, it is enough to say that they are in theory purely legislative. The House has no share in the executive functions of the Senate, nothing to do with confirming appointments or approving treaties. On the other hand, it has the exclusive right of initiating revenue bills and of impeaching officials, features borrowed, through the State Constitutions, from the English House of Commons, and of choosing a President in case there should be no absolute majority of presidential electors for any one candidate. This very important power it exercised in 1801 and 1825.[1]

Setting extraordinary sessions aside, every Congress has two sessions, distinguished as the First or Long and the Second or Short. The long session begins in the fall of the year after the election of a Congress, and continues, with a recess at Christmas, till the July or August

[1] See above, Chapter V.

following. The short session begins in the December after the July adjournment, and lasts till the 4th of March following. The whole working life of a House is thus from ten to twelve months. Bills do not, as in the English Parliament, expire at the end of each session; they run on from the long session to the short one. All however that have not been passed when the fatal 4th March arrives perish forthwith, for the session being fixed by statute cannot be extended at pleasure.[1] There is consequently a terrible scramble to get business pushed through in the last week or two of a Congress.

The House usually meets at noon, and sits till four or six o'clock, though towards the close of a session these hours are lengthened. Occasionally when obstruction occurs, or when at the very end of a session messages are going backwards and forwards between the House, the Senate, and the President, it sits all night long.

The usages and rules of procedure of the House, which differ in many respects from those of the Senate, are too numerous to be described here. It is said that an industrious member needs one whole session to learn them. I will advert only to a few points of special interest, choosing those which illustrate American political ideas or bring out the points of likeness and unlikeness between Congress and the English Parliament. The subject of committees will require a chapter to itself.

An oath or affirmation of fidelity to the Constitution of the United States is (as prescribed by the Constitution) taken by all members;[2] also by the clerk, the sergeant-at-arms, the doorkeeper, and the postmaster.

[1] Senate bills do not die by effluxion of time.

A proposal recently made to extend the session till April and have the President inaugurated then seems likely to be adopted.

[2] The oath is administered by the Speaker, and in the form following:

The sergeant-at-arms is the treasurer of the House, and pays to each member his salary and mileage (travelling expenses). He has the custody of the mace, and the duty of keeping order, which in extreme cases he performs by carrying the mace into a throng of disorderly members. This symbol of authority, which, as in the House of Commons, is moved from its place when the House goes into committee, consists of the Roman *fasces*, in ebony, bound with silver bands in the middle and at the ends, each rod ending in a spear head, at the other end a globe of silver, and on the globe a silver eagle ready for flight. English precedent suggests the mace, but as it could not be surmounted by a crown, Rome has prescribed its design.

The clerk of the last preceding House acts as a sort of temporary chairman till a Speaker is chosen; members then address him, and he decides questions of order.

The proceedings each day begin with prayers, which are conducted by a chaplain who is appointed by the House, not as in England by the Speaker, and who may, of course, be selected from any religious denomination.[1] Lots are drawn for seats at the beginning of the session, each member selecting the place he pleases according as his turn arrives. By courtesy the senior member is allowed to retain the seat he has appropriated before the

"I do solemnly swear (or affirm) that I will support the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God." "Allegiance" to a legal instrument would have seemed an odd expression to those ages in which the notion of allegiance arose.

[1] Sermons do not seem to have been ever preached before either House of Congress, as they still occasionally are before the House of Commons. A sermon was preached at the opening of the French States General in 1789.

drawing by putting his hat upon it. The places at the extreme right and left of the chair are the least desired. Members generally try to secure seats near their friends, or other members from the same State. Although the Democrats are mostly to the Speaker's right hand, members do not sit strictly according to party, a circumstance which deprives invective of much of its dramatic effect. One cannot, as in England, point the finger of scorn at "hon. gentlemen opposite." Every member is required to remain uncovered in the House.

Every member addresses the Speaker and the Speaker only, and refers to another member not by name but as the "gentleman from Pennsylvania," or as the case may be, without any particular indication of the district which the person referred to represents. As there are twenty-eight gentlemen from Pennsylvania, and the descriptives used in the English House of Commons (learned, gallant, right honourable) are not in use, facilities for distinguishing the member intended are not perfect. A member usually speaks from his seat, but may speak from the clerk's desk or from a spot close to the Speaker's chair. No one may pass between the Speaker and the member speaking, a curious bit of adherence to English usage.

Divisions were originally (rule of 17th April 1789) taken by going to the right and left of the chair, according to the old practice of the English House of Commons.[1]

[1] It was not until 1836 (and in fact as a result of the change in the character of the House of Commons made by the Reform Act of 1832) that the present system of recording the names of members who vote by making them pass through lobbies was introduced at Westminster. Till then one party remained in the House while the other retired into the lobby, and only the numbers were recorded. Much dislike was at first evinced to the new plan, and the tellers sometimes found it difficult to ascertain the names of members as they walked past them. At present the tellers merely count the numbers, and the names are taken by four division clerks.

This having been found inconvenient, a resolution of 9th June 1789 established the present practice, whereby members rise in their seats and are counted in the first instance by the Speaker, but if he is in doubt, or if a count be required by one-fifth of a quorum (*i.e.* by one-tenth of the whole House), then by two tellers named by the Speaker, between whom, as they stand in the middle gangway, members pass. If one-fifth of a quorum demand a call of yeas and nays, this is taken; the clerk calls the full roll of the House, and each member answers aye or no to his name, or says "*no vote.*" When the whole roll has been called, it is called over a second time to let those vote who have not voted in the first call. Members may now change their votes. Those who have entered the House after their names were passed on the second call cannot vote, but often take the opportunity of rising to say that they would, if then present in the House, have voted for (or against) the motion. All this is set forth in the *Congressional Record*, which also contains a list of the members not voting and of the pairs.

When the question is an important one, it is obviously necessary that the names of members voting should be put on record. But the call is sometimes demanded in order to give people time to consider how they should vote, and while it is proceeding members may be seen running hither and thither to take the advice of friends or prominent men, not answering to their names on the first call, but awaiting the second call to vote. A process which consumes so much time, for it takes an hour and a quarter to call through the three hundred and twenty-five names, is an obvious and effective engine of obstruction. It is frequently so used, for it can be demanded not only on questions of substance, but on motions to adjourn. This is a rule

which the House cannot alter, for it rests on an express provision of the Constitution, Art. i. § 5.

No one may speak more than once to the same question, unless he be the mover of the motion pending, in which case he is permitted to reply after every member choosing to speak has spoken.

Speeches are limited to one hour, subject to a power to extend this time by unanimous consent, and may, in committee of the whole House, be limited to five minutes. So far as I could learn, this hour rule works very well, and does not tend to bring speeches up to that length as a regular thing. A member is at liberty to give part of his time to other members, and this is in practice constantly done. The member speaking will say: "I yield the floor to the gentleman from Ohio for five minutes," and so on. Thus a member who has once secured the floor has a large control of the debate.

The great remedy against prolix or obstructive debate is the so-called previous question, which is moved in the form, "Shall the main question be now put?" and when ordered closes forthwith all debate, and brings the House to a direct vote on that main question. On the motion for the putting of the main question no debate is allowed; but it does not destroy the right of the member "reporting the measure under consideration" from a committee, to wind up the discussion by his reply. This closure of the debate may be moved by any member without the need of leave from the Speaker, and requires only a bare majority of those present. When directed by the House to be applied in committee, for it cannot be moved after the House has gone into committee, it has the effect of securing five minutes to the mover of any amendment, and five minutes to the member who first "obtains the floor"

(gets the chance of speaking) in opposition to it, permitting no one else to speak. A member in proposing a resolution or motion usually asks at the same time for the previous question upon it, so as to prevent it from being talked out.

Closure by previous question is in almost daily use, and is considered so essential to the progress of business that I never found any member or official who thought it could be dispensed with. Even the senators, who object to its introduction into their own much smaller chamber, agree that it must exist in a large body like the House. To the inquiry whether it was abused, most of my informants answered that this rarely happened, while one, a gentleman officially connected with the House for thirty years, during fourteen of which he had been clerk, went so far as to say that he had never known a case of abuse. This is attributed to the fear entertained of the disapproval of the people, and to the sentiment within the House itself in favour of full and fair discussion, which sometimes induces the majority to refuse the previous question when demanded by one of their own party, or on behalf of a motion which they are as a whole supporting. "No one," they say, "who is *bonâ fide* discussing a subject in a sensible way, would be stopped by the application of the previous question. On the other hand we should never get appropriation bills through without it."

Notwithstanding this powerful engine for expediting business, obstruction, or, as it is called in America, filibustering, is by no means unknown. It is usually practised by making repeated motions for the adjournment of a debate, or for "taking a recess" (suspending the sitting), or for calling the yeas and nays. Between one such motion and another some business must inter-

vene, but as the making of a speech is "business," there is no difficulty in complying with this requirement. No speaking is permitted on these obstructive motions, yet by them time may be wasted for many continuous hours, and if the obstructing minority is a strong one, it generally succeeds, if not in defeating a measure, yet in extorting a compromise. It must be remembered that owing to the provision of the Constitution above mentioned, the House is in this matter not sovereign even over its own procedure. That rules are not adopted, as they might be, which would do more than the present system does to extinguish filibustering, is due partly to this provision, partly to the notion that it is safer to leave some means open by which a minority can make itself disagreeable, and to the belief that adequate checks exist on any gross abuse of such means. These checks are two. One is the fact that filibustering will soon fail unless conducted by nearly the whole of the party which happens to be in a minority, and that so large a section of the House will not be at the trouble of joining in it unless upon some really serious question. Some few years ago, seventeen or eighteen members tried to obstruct systematically a measure they objected to, but their number proved insufficient, and the attempt failed. But at an earlier date, during the Reconstruction troubles which followed the war, the opposition of the solid Democratic party, then in a minority, succeeded in defeating a bill for placing five of the southern States under military government. The other check is found in the fear of popular disapproval. If the nation sees public business stopped and necessary legislation delayed by factious obstruction, it will visit its displeasure both upon the filibustering leaders individually, and on the whole of the party

compromised. However hot party spirit may be, there is always a margin of moderate men in both parties whom the unjustifiable use of legally permissible modes of opposition will alienate. Since such men can make themselves felt at the polls when the next election arrives, respect for their opinion cools the passion of congressional politicians. Thus the general feeling is that as the power of filibustering is in extreme cases a safeguard against abuses of the system of closure by "previous question," so the good sense of the community is in its turn a safeguard against abuses of the opportunities which the rules still leave open. One ex-Speaker, who had had large experience in leading both a majority and a minority of the House, observed to me that he thought the rules, taken all in all, as near perfection as any rules could be. This savours of official optimism. We all know the attachment which those who have grown old in working a system show to its faults as well as to its merits. Still, true is it that congressmen generally complain less of the procedure under which they live, and which seems to an English observer tyrannical, than do members of the English House of Commons of the less rigid methods of their own ancient and famous body. I know no better instance of the self-control and good humour of Americans than the way in which the minority in the House generally submit to the despotism of the majority, consoling themselves with the reflection that it is all according to the rules of the game, and that their turn will come in due course. To use the power of closing debate as stringently at Westminster as it is used at Washington would revolutionize the life of the House of Commons. But the House of Representatives is an assembly of a very different nature. Like the House of Commons

it is a legislating, if hardly to be deemed a governing, body. But it is not a debating body. It rules through and by its committees, in which discussion is unchecked by any closing power; and the whole House does little more than register by its votes the conclusions which the committees submit. One subject alone, the subject of revenue, that is to say, taxation and appropriation, receives genuine discussion by the House at large. And although the "previous question" is often applied to expedite appropriation bills, it is seldom applied till opportunity has been given for the expression of all relevant views.

The rules regarding the procedure in committee of the whole House are in the main similar to those of the British House of Commons; but the chairman of such a committee is not (as usually in England) a permanent chairman of Ways and Means, but a person nominated by the Speaker on each occasion. No member can speak twice to any question in Committee of the Whole until every member desiring to speak shall have spoken.

The House has a power of going into secret session whenever confidential communications are received from the President, or a member informs it that he has communications of a secret nature to make. But this power seems to have been rarely used, certainly never of late years. Every word spoken is reported by official stenographers and published in the *Congressional Record*, and the huge galleries are never cleared.

The number of bills brought into the House every year is very large, averaging over 7000. In the thirty-seventh Congress (1861-63) the total number of bills introduced was 1026, viz.:—613 House bills, and 433 Senate bills. In the forty-sixth it had risen to 9481, of which 7257 were House bills, 2224 Senate bills, showing

that the increase has been much larger in the House than in the Senate. In the forty-ninth Congress (1885-87) the number was rising still further, the number up to July 1886 being 12,906, exclusive of 277 joint resolutions. In the British House of Commons the total number of bills introduced was, in the session of 1885, 481, of which 202 were public and 279 private bills.[1] America is, of course, a far larger country, but the legislative competence of Congress is incomparably smaller than that of the British Parliament, seeing that the chief part of the field both of public bill and private bill legislation belongs in America to the several States. By far the larger number of bills in Congress are what would be called in England "private" or "local and personal" bills, *i.e.* they establish no general rule of law but are directed to particular cases. Such are the numerous bills for satisfying persons with claims against the Federal Government, and for giving or restoring pensions to individuals alleged to have served in the Northern armies during the War of Secession. It is only to a very small extent that bills can attempt to deal with ordinary private law, since nearly the whole of that topic belongs to State legislation. It is needless to say that the proportion of bills that pass to bills that fail is a very small one, not one-thirtieth.[2] As in England so even more in America, bills are lost

[1] The session of 1886 was cut short by a dissolution, and therefore is not a typical case.

[2] In the British Parliamentary session of 1885, out of 202 public bills brought in, 144 passed the House of Commons, and several of these were rejected by the House of Lords. Of these 144 public bills 116 had originated in the House of Commons, 28 in the House of Lords, 54 were Government bills, 62 "provisional order" bills, only 28 bills of private members. Of the 279 private bills 203 passed. The number of public bills introduced is increasing in England, but not so rapidly as in America. In the session of 1888, 282 (besides 45 provisional order bills) had been introduced in the House of Commons up to 13th July, a few of them brought from the House of Lords.

less by direct rejection than by failing to reach their third reading, a mode of extinction which the good-nature of the House, or the unwillingness of its members to administer snubs to one another, would prefer to direct rejection, even were not the want of time a sufficient excuse to the committees for failing to report them. One is told in Washington that few bills are brought in with a view to being passed. They are presented in order to gratify some particular persons or places, and it is well understood in the House that they must not be taken seriously. Sometimes a less pardonable motive exists. The great commercial companies, and especially the railroad companies, are often through their land grants and otherwise brought into relations with the Federal Government. Bills are presented in Congress which purport to withdraw some of the privileges of these companies, or to establish or favour rival enterprises, but whose real object is to levy blackmail on these wealthy bodies, since it is often cheaper for a company to buy off its enemy than to defeat him either by the illegitimate influence of the lobby, or by the strength of its case in open combat. Several great corporations have thus to maintain a permanent staff at Washington for the sake of resisting legislative attacks upon them, some merely extortionate, some intended to win local popularity.

The title and attributions of the Speaker of the House are taken from his famous English original. But the character of the office has greatly altered from that original. The note of the Speaker of the British House of Commons is his impartiality. He has indeed been chosen by a party, because a majority means in England a party. But on his way from his place on the benches to the Chair he is expected to shake off and leave behind

all party ties and sympathies. Once invested with the wig and gown of office he has no longer any political opinions, and must administer exactly the same treatment to his political friends and to those who have been hitherto his opponents, to the oldest or most powerful minister and to the youngest or least popular member. His duties are limited to the enforcement of the rules and generally to the maintenance of order and decorum in debate, including the selection, when several members rise at the same moment, of the one who is to carry on the discussion. These are duties of great importance, and his position one of great dignity, but neither the duties nor the position imply political power. It makes little difference to any English party in Parliament whether the occupant of the chair has come from their own or from the hostile ranks. The Speaker can lower or raise the tone and efficiency of the House as a whole by the way he presides over it: but a custom as strong as law forbids him to render help to his own side even by private advice. Whatever information as to parliamentary law he may feel free to give must be equally at the disposal of every member.

In America the Speaker has immense political power, and is permitted, nay expected, to use it in the interests of his party. In calling upon members to speak he prefers those of his own side. He decides in their favour such points of order as are not distinctly covered by the rules. His authority over the arrangement of business is so large that he can frequently advance or postpone particular bills or motions in a way which determines their fate. Although he does not figure in party debates in the House, he may and does advise the other leaders of his party privately; and when they "go into caucus" (*i.e.* hold a party

meeting to determine their action on some pending question) he is present and gives counsel. He is usually the most eminent member of the party who has a seat in the House, and is really, so far as the confidential direction of its policy goes, almost its leader. His most important privilege is, however, the nomination of the numerous standing committees already referred to. In the first Congress (April 1789) the House tried the plan of appointing its committees by ballot; but this worked so ill that in January 1790 the following rule was passed:—"All committees shall be appointed by the Speaker unless otherwise specially directed by the House." This rule has been re-adopted by each successive Congress since then.[1] Not only does he, at the beginning of each Congress, select all the members of each of these committees, he even chooses the chairman of each, and thereby vests the direction of its business in hands approved by himself. The chairman is of course always selected from the party which commands the House, and the committee is so composed as to give that party a majority. Since legislation, and so much of the control of current administration as the House has been able to bring within its grasp, belong to these committees, their composition practically determines the action of the House on all questions of moment, and as the chairmanships of the more important committees are the posts of most influence, the disposal of them is a

[1] In England select committees on public matters are appointed by the House, *i.e.* practically by the "whips" of the several parties, though sometimes a discussion in the House leads to the addition of other members. Hybrid committees are appointed partly by the House and partly by the committee of Selection. Private bill committees are appointed by the committee of Selection. This committee is a small body of the older and more experienced members, intended to represent fairly all parties and sections of opinion.

tremendous piece of patronage by which a Speaker can attract support to himself and his own section of the party, reward his friends, give politicians the opportunity of rising to distinction or practically extinguish their congressional career. The Speaker is, of course, far from free in disposing of these places. He has been obliged to secure his own election to the chair by promises to leading members and their friends; and while redeeming such promises, he must also regard the wishes of important groups of men or types of opinion, must compliment particular States by giving a place on good committees to their prominent representatives, must avoid nominations which could alarm particular interests. These conditions surround the exercise of his power with trouble and anxiety. Yet after all it is power, power which in the hands of a capable and ambitious man becomes so far-reaching that it is no exaggeration to call him the second, if not the first political figure in the United States, with an influence upon the fortunes of men and the course of domestic events superior, in ordinary times, to the President's, although shorter in its duration and less patent to the world.[1]

The Speaker's distribution of members among the

[1] "The appointment of the committees implies the distribution of work to every member. It means the determination of the cast business shall take. It decides for or against all large matters of policy, or may so decide; for while Speakers will differ from each other greatly in force of character and in the wish to give positive direction to affairs, the weakest man cannot escape from the necessity of arranging the appointments with a view to the probable character of measures which will be agitated. This, however, is far from the measure of the Speaker's power. All rules are more or less flexible. The current of precedents is never consistent or uniform. The bias of the Speaker at a critical moment will turn the scale. Mr. Randall as Speaker determined the assent of the House to the action of the Electoral Commission [of 1877]. Had he wished for a revolutionary attempt to prevent the announcement of Hayes's election, no one who has had experience in Congress, at least, will doubt that he could have forced the collision."—From an article in the New York *Nation* of April 4, 1878, by an experienced member of Congress.

committees is, next to his own election, the most critical point in the history of a Congress, and that watched with most interest. He devotes himself to it for the fortnight after his installation with an intensity equalling that of a European prime minister constructing a cabinet. The parallel goes further, for as the chairmanships of the chief committees may be compared to the cabinet offices of Europe, so the Speaker is himself a great party leader as well as the president of a deliberative assembly.

Although expected to serve his party in all possible directions, he must not resort to all possible means. Both in the conduct of debate and in the formation of committees a certain measure of fairness to opponents is required from him. He must not palpably wrest the rules of the House to their disadvantage, though he may decide all doubtful points against them. He must give them a reasonable share of "the floor" (*i.e.* of debate). He must concede to them proper representation on committees. To define his duties on these points is impossible; yet everybody knows when they have been neglected, as was the case with a recent Speaker, whom I heard universally condemned because he had usually "recognized" (*i.e.* called on in debate) his own friends only, and had otherwise crossed the line which custom has drawn between ordinary and oppressive partisanship.

The dignity of the Speaker's office is high. He receives a salary of $8000 a year (£1600), which is a large salary for America. In rank he stands next after the President and on a level with the justices of the Supreme Court. Washington society was lately agitated by a claim of his wife to take precedence over the wives of these judges, a claim so ominous in a democratic country that efforts were made to have it adjusted without a formal decision.

CHAPTER XIV

THE HOUSE AT WORK

AN Englishman expects to find his House of Commons reproduced in the House of Representatives. He has the more reason for this notion because he knows that the latter was modelled on the former, has borrowed many of its rules and technical expressions, and regards the procedure of the English chamber as a storehouse of precedents for its own guidance.[1] The notion is delusive. Resemblances of course there are. But an English parliamentarian who observes the American House at work is more impressed by the points of contrast than by those of similarity. The life and spirit of the two bodies are wholly different.

The room in which the House meets is in the south wing of the Capitol, the Senate and the Supreme Court being lodged in the north wing. It is more than thrice as large as the English House of Commons, with a floor about equal in area to that of Westminster Hall, 139 feet long by 93 feet wide and 36 feet high.[2] Light is

[1] Both the Senate and the House of Representatives have recognized Jefferson's *Manual of Parliamentary Practice* as governing the House when none of its own rules (or of the joint rules of Congress) is applicable. This manual, prepared by President Jefferson, is based on English precedents.

[2] Not reckoning in the staircase at the south end of Westminster Hall. The figure of the two halls is different, Westminster Hall being rather longer, and the House of Representatives wider. The English House of Commons is only 75 feet long by 45 broad.

admitted through the ceiling. There are on all sides deep galleries running backwards over the lobbies, and capable of holding two thousand five hundred persons. The proportions are so good that it is not till you observe how small a man looks at the farther end, and how faint ordinary voices sound, that you realize its vast size. The seats are arranged in curved concentric rows looking towards the Speaker, whose handsome marble chair is placed on a raised marble platform projecting slightly forward into the room, the clerks and the mace below in front of him, in front of the clerks the official stenographers, to the right the seat of the sergeant-at-arms. Each member has a revolving armchair, with a roomy desk in front of it, where he writes and keeps his papers. Behind these chairs runs a railing, and behind the railing is an open space into which strangers may be brought, where sofas stand against the wall, and where smoking is practised, even by strangers, though the rules forbid it.

When you enter, your first impression is of noise and turmoil, a noise like that of short sharp waves in a Highland loch, fretting under a squall against a rocky shore. The raising and dropping of desk lids, the scratching of pens, the clapping of hands to call the pages, keen little boys who race along the gangways, the pattering of many feet, the hum of talking on the floor and in the galleries, make up a din over which the Speaker with the sharp taps of his hammer, or the orators straining shrill throats, find it hard to make themselves audible. I never heard American voices sound so harsh or disagreeable as they do here. Nor is it only the noise that gives the impression of disorder. Often three or four members are on their feet at once, each shouting to catch

the Speaker's attention. Others, tired of sitting still, rise to stretch themselves, while the Western visitor, long, lank, and imperturbable, leans his arms on the railing, chewing his cigar, and surveys the scene with little reverence. Less favourable conditions for oratory cannot be imagined, and one is not surprised to be told that debate was more animated and practical in the much smaller room which the House formerly occupied.

Not only is the present room so big that only a powerful and well-trained voice can fill it, but the desks and chairs make a speaker feel as if he were addressing furniture rather than men, while of the members few seem to listen to the speeches. It is true that they sit in the House instead of running out into the lobbies as people do in the British House of Commons, but they are more occupied in talking or writing, or reading newspapers, than in attending to the debate. To attend is not easy, for only a shrill voice can overcome the murmurous roar; and one sometimes finds the newspapers in describing an unusually effective speech, observe that "Mr. So-and-So's speech drew listeners about him from all parts of the House." They could not hear him where they sat, so they left their places to crowd in the gangways near him. "Speaking in the House," says an American writer, "is like trying to address the people in the Broadway omnibuses from the kerbstone in front of the Astor House. . . . Men of fine intellect and of good ordinary elocution have exclaimed in despair that in the House of Representatives the mere physical effort to be heard uses up all the powers, so that intellectual action becomes impossible. The natural refuge is in written speeches or in habitual silence, which one dreads more and more to break."

It is hard to talk calm good sense at the top of your voice, hard to unfold a complicated measure. A speaker's vocal organs react upon his manner, and his manner on the substance of his speech. It is also hard to thunder at an unscrupulous majority or a factious minority when they do not sit opposite to you, but all round you and behind you as is the case in the House. The Americans think this an advantage, because it prevents scenes of disorder. They may be right; but what order gains oratory loses. It is admitted that the desks are a mistake, as encouraging inattention by enabling men to write their letters; but though nearly everybody agrees that they would be better away, nobody supposes that a proposition to remove them would succeed.[1] So too the huge galleries add to the area the voice has to fill; but the public like them, and might resent a removal to a smaller room. The smoking shocks an Englishman, but not more than the English practice of wearing hats in both Houses of Parliament shocks an American. Interruption, cries of "Divide," interjected remarks, are not more frequent—when I have been present they seemed to be much less frequent—than in the House of Commons. Applause is given more charily, as is usually the case in America. Instead of "Hear, hear," there is a clapping of hands and hitting of desks.

The method of taking a division by calling on each party to stand up, first the ayes and then the noes, is more expeditious than the English plan of sending men into opposite lobbies, but the calling of the roll, which one-fifth of half the House can and frequently does

[1] The House decided in 1859, at the end of one Congress, that the desks should be removed from the Hall (as the House is called), but in the next succeeding session the old arrangement was resumed.

demand, is slower. Both methods of dividing are less dramatic than the English, and neither compels a man to vote, for if you wish to abstain, you need not rise; and when the roll is called you may refrain from answering to your name, or may slip outside the bar.

There is little good speaking. I do not mean merely that fine oratory, oratory which presents valuable thoughts in eloquent words, is rare, for it is rare in all assemblies. But in the House of Representatives a set speech upon any subject of importance tends to become not an exposition or an argument but a piece of elaborate and high-flown declamation. Its author is often wise enough to send direct to the reporters what he has written out, having read aloud a small part of it in the House. When it has been printed *in extenso* in the *Congressional Record* (leave to get this done being readily obtained), he has copies struck off and distributes them among his constituents. Thus everybody is pleased and time is saved.[1]

That there is not much good business debating, by which I mean a succession of comparatively short speeches addressed to a practical question, and hammering it out by the collision of mind with mind, arises not from any want of ability among the members, but from the unfavourable conditions under which the House acts. Most of the practical work is done in the standing committees, while much of the House's time is consumed in pointless discussions, where member after member delivers himself upon large questions, not likely to be brought to a definite issue. Many of the speeches thus called forth have a value as repertories of facts, but

[1] I was told that formerly speeches might be printed in the *Record* as a matter of course, but that, a member having used this privilege to print and circulate a poem, the right was restrained.

the debate as a whole is unprofitable and languid. On the other hand the five-minute debates which take place, when the House imposes that limit of time, in Committee of the Whole on the consideration of a bill reported from a standing committee, are often lively, pointed, and effective. The topics which excite most interest and are best discussed are those of taxation and the appropriation of money, more particularly to public works, the improvement of rivers and harbours, erection of Federal buildings, and so forth. This kind of business is indeed to most of its members the chief interest of Congress, the business which evokes the finest skill of a tactician and offers the severest temptations to a frail conscience. As a theatre or school either of political eloquence or political wisdom, the House has been inferior not only to the Senate but to most European assemblies. Nor does it enjoy much consideration at home. Its debates are very shortly reported in the Washington papers as well as in those in Philadelphia and New York. They are not widely read, and do little to instruct or influence public opinion.

This is of course only one part of a legislature's functions. An assembly may despatch its business successfully and yet shine with few lights of genius. But the legislation on public matters which the House turns out is scanty in quantity and generally mediocre in quality. What is more, the House tends to avoid all really grave and pressing questions, skirmishing round them, but seldom meeting them in the face or reaching a decision which marks an advance. If one makes this observation to an American, he replies that at this moment there are few such questions lying within the competence of Congress, and that in his country representatives must not attempt to move

faster than their constituents. This latter remark is eminently true; it expresses a feeling which has gone so far that Congress conceives its duty to be to follow and not to seek to lead public opinion. The harm actually suffered so far is not grave. But the European observer cannot escape the impression that Congress might fail to grapple with a serious public danger, and is at present hardly equal to the duty of guiding and instructing the political intelligence of the nation.

In all assemblies one must expect abundance of unreality and pretence, many speeches obviously addressed to the gallery, many bills meant to be circulated but not to be seriously proceeded with. However, the House seems to indulge itself more freely in this direction than any other chamber of equal rank. Its galleries are large, holding 2500 persons. But it talks and votes, I will not say to the galleries, for the galleries cannot hear it, but as if every section of American opinion was present in the room. It adopts unanimously resolutions which perhaps no single member in his heart approves of, but which no one cares to object to, because it seems not worth while to do so. This habit sometimes exposes it to a snub, such as that administered by Prince Bismarck in the matter of the resolution of condolence with the German Parliament on the death of Lasker, a resolution harmless indeed but certainly superfluous and possibly obtrusive. A practice unknown to other countries is of course misunderstood by them, and may provoke resentment. The resolution requesting the British Government to suspend the execution of O'Donnell, the murderer of the informer Carey, was adopted by the House as a mere matter of form, nobody, except a few Irish members, desiring it, and not even they expecting it to

produce any effect. A bill brought into the House in the session of 1886 requesting the President to summon a commercial Congress of all transatlantic republics to form a species of American commercial league, produced alarm in the British West Indies and led to solemn questions in the British House of Commons, while few people in America noticed it. American statesmen keep their pockets full of the loose cash of empty compliments and pompous phrases, and become so accustomed to scatter it among the crowd that they are surprised when a complimentary resolution or electioneering bill, intended to humour some section of opinion at home, is taken seriously abroad. The House is particularly apt to err in this way, because having no responsibility in foreign policy, and little sense of its own dignity, it applies to international affairs the habits of election meetings.

Watching the House at work, and talking to the members in the lobbies, an Englishman naturally asks himself how the intellectual quality of the body compares with that of the House of Commons. His American friends have prepared him to expect a marked inferiority. They are fond of running down congressmen. The cultivated New Englanders and New Yorkers do this out of intellectual fastidiousness, and in order to support the rôle which they unconsciously fall into when talking to Europeans. The rougher Western men do it because they would not have congressmen either seem or be better in any way than themselves, since that would be opposed to republican equality. A stranger who has taken literally all he hears is therefore surprised to find so much character, shrewdness, and keen though limited intelligence among the representatives. Their average business capacity did not seem to me below that

of members of the House of Commons of 1880-85. True it is that great lights, such as usually adorn the British chamber, are absent: true also that there are fewer men who have received a high education which has developed their tastes and enlarged their horizons. The want of such men depresses the average. It is raised, however, by the almost total absence of two classes hitherto well represented in the British Parliament, the rich, dull parvenu, who has bought himself into public life, and the perhaps equally unlettered young sporting or fashionable man who, neither knowing nor caring anything about politics, has come in for a county or (before 1885) a small borough, on the strength of his family estates. Few congressmen sink to so low an intellectual level as these two sets of persons, for congressmen have almost certainly made their way by energy and smartness, picking up a knowledge of men and things "all the time." In respect of width of view, of capacity for penetrating thought on political problems, representatives are scarcely above the class from which they came, that of second-rate lawyers or farmers, less often merchants or petty manufacturers. They do not pretend to be statesmen in the European sense of the word, for their careers, which have made them smart and active, have given them little opportunity for acquiring such capacities. As regards manners they are not polished, because they have not lived among polished people; yet neither are they rude, for to get on in American politics one must be civil and pleasant. The standard of parliamentary language, and of courtesy generally, has been steadily rising during the last few decades; I am not sure that it is now lower than in the British House of Commons, where those same decades appear to have witnessed

a decline. Scenes of violence and confusion such as occasionally convulse the French chamber, and were common in Washington before the War of Secession, are now unknown.

On the whole, the most striking difference between the House of Representatives and European popular assemblies is its greater homogeneity. The type is marked; the individuals vary little from the type. In Europe all sorts of persons are sucked into the vortex of the legislature, nobles and landowners, lawyers, physicians, business men, artisans, journalists, men of learning, men of science. In America five representatives out of six are politicians pure and simple, members of a class as well defined as any one of the above-mentioned European classes. The American people, though it is composed of immigrants from every country and occupies a whole continent, tends to become more uniform than most of the great European peoples; and this characteristic is palpable in its legislature.

Uneasy lies the head of an ambitious congressman,[1] for the chances are about even that he will lose his seat at the next election. It was observed in 1788 that half of the members of each successive State legislature were new members, and this average has been maintained in the Federal legislature. In the forty-eighth Congress, elected in 1882, only 148 out of the 325 members had sat in the forty-seventh Congress. In the fiftieth the proportion was slightly larger, but only 206 out of the 325 members had sat in any preceding Congress. In England the proportion of members re-elected from

[1] The term "Congressman" is commonly used to describe a member of the House of Representatives, though of course it ought to include senators also. So in England "Member of Parliament" means member of the House of Commons, though it covers all persons who have seats in the House of Lords.

Parliament to Parliament is much higher. It was remarked as a novelty in the Parliament of 1885, elected after a sweeping measure for the redistribution of seats, that about one-third of the members had not sat in the Parliament of 1880. Any one can see how much influence this constant change in the composition of the American House must have upon its legislative efficiency.

I have kept to the last the feature of the House which an Englishman finds the strangest.

It has parties, but they are headless. There is neither Government nor Opposition; neither leaders nor whips. No minister, no person holding any Federal office or receiving any Federal salary, can be a member of it. That the majority may be and often is opposed to the President and his cabinet, does not strike Americans as odd, because they proceed on the theory that the legislative ought to be distinct from the executive authority. Since no minister sits, there is no official representative of the party which for the time being holds the reins of the executive government. Neither is there any unofficial representative. And as there are no persons whose opinions expressed in debate are followed, so there are none whose duty it is to bring up members to vote, to secure a quorum, to see that people know which way the bulk of the party is going.

So far as the majority has a chief, that chief is the Speaker, who has been chosen by them as their ablest and most influential man; but as the Speaker seldom joins in debate (though he may do so by leaving the chair, having put some one else in it), the chairman of the most important committee, that of Ways and Means, enjoys a sort of eminence, and comes nearer than any one else to the position of leader of the

House.[1] But his authority does not always enable him to secure co-operation for debate among the best speakers of his party, putting up now one now another, after the fashion of an English prime minister, and thereby guiding the general course of the discussion.

The minority do not formally choose a leader, nor is there usually any one among them whose career marks him out as practically the first man, but the person whom they have put forward as their party candidate for the Speakership, giving him what is called "the complimentary nomination," has a sort of vague claim to be so regarded. This honour amounts to very little. In the Congress which met in December 1883, Mr. Keifer of Ohio, Speaker in the last preceding Congress, received such a complimentary nomination from the Republican party against Mr. Carlisle of Kentucky, whom the Democratic majority elected. But the Republicans immediately afterwards refused to treat Mr. Keifer as leader, and left him, on some motion which he made, in a ridiculously small minority.

How then does the House work?

If it were a Chamber, like those of France or Germany, divided into four or five sections of opinion, none of which commands a steady majority, it would not work at all. But parties are few in the United States, and their cohesion tight. There are usually two only, so nearly equal in strength that the majority cannot afford to dissolve into groups like those of France. Hence upon all large national issues, whereon the general sentiment of the party has been declared, both the majority and the minority know how to vote, and vote solid.

If the House were, like the English House of Commons,

[1] The Chairman of the Committee on Appropriations has perhaps as much real power.

to some extent an executive as well as a legislative body —one by whose co-operation and support the daily business of government had to be carried on—it could not work without leaders and whips. This it is not. It neither creates, nor controls, nor destroys, the administration, which depends on the President, himself the offspring of a direct popular mandate.

"Still," it may be replied, "the House has important functions to discharge. Legislation comes from it. Supply depends on it. It settles the tariff, and votes money for the civil and military services, besides passing measures to cure the defects which experience must disclose in the working of every government, every system of jurisprudence. How can it satisfy these calls upon it without leaders and organization?"

To a European eye, it does not seem to satisfy them. It votes the necessary supplies, but not wisely, giving sometimes too much, sometimes too little money, and taking no adequate securities for the due application of the sums voted. For many years past it has fumbled over both the tariff problem and the currency problem. It produces few useful laws, and leaves on one side grave practical questions, such as the silver problem, international copyright, the establishment of a general bankrupt law. An Englishman is disposed to ascribe these failures to the fact that as there are no leaders, there is no one responsible for the neglect of business, the miscarriage of bills, the unwise appropriation of public funds. "In England," he says, "the ministry of the day bears the blame of whatever goes wrong in the House of Commons. Having a majority, it ought to be able to do what it desires. If it pleads that its measures have been obstructed, and that it cannot under the faulty procedure of the House of Commons accomplish what it

seeks, it is met, and crushed, by the retort that in such case it ought to have the procedure changed. What else is its majority good for but to secure the efficiency of Parliament? In America there is no person against whom similar charges can be brought; although conspicuous folly or perversity on the part of the majority tends to discredit them collectively with the public, and may damage them at the next presidential or congressional election. But responsibility, to be properly effective, ought to be fixed on a few conspicuous leaders. Is not the want of such men, men to whom the country can look, and whom the ordinary members will follow, the cause of some of the faults which are charged on Congress, of its hesitations, its inconsistencies and changes, its ignoble surrenders to some petty clique, its deficient sense of dignity, its shrinking from troublesome questions, its proclivity to jobs?"

Two American statesmen to whom such a criticism was submitted, replied as follows: "It is not for want of leaders that Congress has forborne to settle the questions mentioned, but because the division of opinion in the country regarding them has been faithfully reflected in Congress. The majority has not been strong enough to get its way; and this has happened, not only because abundant opportunities for resistance arise from the methods of doing business, but still more because no distinct impulse or mandate towards any particular settlement of these questions has been received from the country. It is not for Congress to go faster than the people. When the country knows and speaks its mind, Congress will not fail to act." The significance of this reply lies in its pointing to a fundamental difference between the conception of the respective positions and duties of a representative body and of

the nation at large entertained by Americans, and the conception which has hitherto prevailed in Europe. Europeans have thought of a legislature as belonging to the governing class. In America there is no such class. Europeans think that the legislature ought to consist of the best men in the country, Americans that it should be a fair average sample of the country. Europeans think that it ought to lead the nation, Americans that it ought to follow the nation.

Without some sort of organization, an assembly of three hundred and thirty men would be a mob, so necessity has provided in the system of committees a substitute for the European party organization. This system of committees will be explained in next chapter; for the present it is enough to observe that when a matter which has been (as all bills are) referred to a committee, comes up in the House to be dealt with there, the chairman of the particular committee is treated as a leader *pro hac vice*, and members who knew nothing of the matter are apt to be guided by his speech or his advice given privately. If his advice is not available, or is suspected because he belongs to the opposite party, they seek direction from the member in charge of the bill, if he belongs to their own party, or from some other member of the committee, or from some friend whom they trust. When a debate arises unexpectedly on a question of importance, members are often puzzled how to vote. The division being taken, they get some one to move a call of yeas and nays, and while this slow process goes on, they scurry about asking advice as to their action, and give their votes on the second calling over if not ready on first. If the issue is one of serious consequence to the party, a recess is demanded by the majority, say for two

hours. The House then adjourns, each party "goes into caucus" (the Speaker possibly announcing the fact), and debates the matter with closed doors. Then the House resumes, and each party votes solid according to the determination arrived at in caucus. In spite of these expedients, surprises and scratch votes are not uncommon.

I have spoken of the din of the House of Representatives, of its air of restlessness and confusion, contrasting with the staid gravity of the Senate, of the absence of dignity both in its proceedings and in the bearing and aspect of individual members. All these things notwithstanding, there is something impressive about it, something not unworthy of the continent for which it legislates.

This huge gray hall, filled with perpetual clamour, this multitude of keen and eager faces, this ceaseless coming and going of many feet, this irreverent public, watching from the galleries and forcing its way on to the floor, all speak to the beholder's mind of the mighty democracy, destined in another century to form one half of civilized mankind, whose affairs are here debated. If the men are not great, the interests and the issues are vast and fateful. Here, as so often in America, one thinks rather of the future than of the present. Of what tremendous struggles may not this hall become the theatre in ages yet far distant, when the parliaments of Europe have shrunk to insignificance ?

CHAPTER XV

THE COMMITTEES OF CONGRESS

THE most abiding difficulty of free government is to get large assemblies to work promptly and smoothly either for legislative or executive purposes. We perceive this difficulty in primary assemblies of thousands of citizens, like those of ancient Athens or Syracuse; we see it again in the smaller representative assemblies of modern countries. Three methods of overcoming it have been tried. One is to leave very few and comparatively simple questions to the assembly, reserving all others for a smaller and more permanent body, or for executive officers. This was the plan of the Romans, where the *comitia* (primary assemblies) were convoked only to elect magistrates and pass laws, which were short, clear, and submitted *en bloc*, without possibility of amendment, for a simple Yes or No. Another method is to organize the assemblies into well-defined parties, each recognizing and guided by one or more leaders, so that on most occasions and for most purposes the rank and file of members exert no volition of their own, but move like battalions at the word of command. This has been the English system since about the time of Queen Anne. It was originally worked by means of extensive corruption; and not till this phase was passing away did it become an object of

admiration to the world. Latterly it has been reproduced in the parliaments of most modern European states and of the British colonies. The third method, which admits of being more or less combined with the second, is to divide the assembly into a number of smaller bodies to which legislative and administrative questions may be referred, either for final determination or to be examined and reported on to the whole body. This is the system of committees, applied to some small extent in England, to a larger extent in France under the name of *bureaux*, and most of all in the United States. Some account of its rules and working there is essential to a comprehension of the character of Congress and of the relations of the legislative to the executive branch of the Federal Government.

When Congress first met in 1789, both Houses found themselves, as the State legislatures had theretofore been and still are, without official members and without leaders.[1] The Senate occupied itself chiefly with executive business, and appointed no standing committees until 1816. The House however had bills to discuss, plans of taxation to frame, difficult questions of expenditure, and particularly of the national debt, to consider. For want of persons whose official duty required them, like English ministers, to run the machine by drafting schemes and bringing the raw material of its work into shape, it was forced to appoint committees. At first there were few; even in 1802 we find only five. As the numbers of the House increased and more business flowed in, additional committees were appointed; and as the House became more and more

[1] The Congress of the Confederation (1781-88) had been a sort of diplomatic congress of envoys from States, and furnished few precedents available for the Congress under the new constitution.

occupied by large political questions, minor matters were more and more left to be settled by these select bodies. Like all legislatures, the House constantly sought to extend its vision and its grasp, and the easiest way to do this was to provide itself with new eyes and new hands in the shape of further committees. The members were not, like their contemporaries in the English House of Commons, well-to-do men, mostly idle; they were workers and desired to be occupied. It was impossible for them all to speak in the House; but all could talk in a committee. Every permanent body cannot help evolving some kind of organization. Here the choice was between creating one ruling committee which should control all business, like an English ministry, and distributing business among a number of committees, each of which should undertake a special class of subjects. The latter alternative was recommended, not only by its promising a useful division of labour, but by its recognition of republican equality. It therefore prevailed, and the present elaborate system grew slowly to maturity.

To avoid the tedious repetition of details, I have taken the House of Representatives and its committees for description, because the system is more fully developed there than in the Senate. But a very few words on the Senate may serve to prevent misconceptions.

There were in 1888 forty-one standing Senate committees, appointed for two years, being the period of a Congress.[1] They and their chairmen are chosen not by the presiding officer but by the Senate itself,

[1] Although the Senate is a permanent body, its proceedings are for some purposes regulated with reference to the re-election every two years of the House; just as in England the peers are summoned afresh at the beginning of each Parliament, although they, except the Scotch representative peers, sit for life.

voting by ballot. Practically they are selected by a caucus of the party majority meeting in secret conclave, and then carried wholesale by vote in the Senate. Each consists of from three to eleven members, the most common numbers being seven and nine, and all senators sit on more than one committee, some upon four or more. The chairman is appointed by the Senate and not by the committees themselves. There are also select committees appointed for a special purpose and lasting for one session only.[1] Every bill introduced goes after its first and second reading (which are granted as of course) to a standing committee, which examines and amends it, and reports it back to the Senate.

There were in the fiftieth Congress (1888) fifty-four standing committees of the House, *i.e.* committees appointed under standing regulations, and therefore regularly formed at the beginning of every Congress. Each committee consists of from three to sixteen members, eleven and thirteen being the commonest numbers.[2] Every member of the House is placed on some one committee, and few on more than one. Besides these, select committees on particular subjects of current interest are appointed from time to time. In the forty-ninth Congress there were seven such committees. A complete list of the committees will be found at the end of this chapter. The most important standing committees are the following:—Ways and means; appropriations; elections; banking and currency; accounts; rivers and harbours; judiciary (including changes in private law as well as in courts of justice); railways and canals; foreign affairs; naval affairs; military affairs;

[1] In January 1888 there were seven such committees.

[2] The committee rooms are smaller than those of the British Parliament; they are carpeted and furnished like private apartments.

public lands; agriculture; claims; and the several committees on the expenditures of the various departments of the administration (war, navy, etc.)

The members of every standing committee are nominated by the Speaker at the beginning of each Congress, and sit through its two sessions; those of a select committee also by the Speaker, after the committee has been ordered by the House. A select committee lasts only for the session. In pursuance of the rule that the member first named shall be chairman, the Speaker has also the selection of all the chairmen.

To some one of these standing committees each and every bill is referred. Its second as well as its first reading is granted as of course, and without debate, since there would be no time to discuss the immense number of bills presented. When read a second time it is referred under the general rules to a committee; but doubts often arise as to which is the appropriate committee, because a bill may deal with a subject common to two or more jurisdictions, or include topics some of which belong to one jurisdiction, others to another. The disputes which may in such cases arise between several committees lead to keen debates and divisions, because the fate of the measure may depend on which of two possible paths it is made to take, since the one may bring it before a tribunal of friends, the other before a tribunal of enemies. Such disputes are determined by the vote of the House itself.

Not having been discussed, much less affirmed in principle, by the House, a bill comes before its committee with no presumption in its favour, but rather as a shivering ghost stands before Minos in the nether world. It is one of many, and for the most a sad fate is reserved. The committee may take evidence regarding

it, may hear its friends and its opponents. They usually do hear the member who has introduced it, since it seldom happens that he has himself a seat on the committee. Members who are interested approach the committee and state their case there, not in the House, because they know that the House will have neither time nor inclination to listen. The committee can amend the bill as they please, and although they cannot formally extinguish it, they can practically do so by reporting adversely, or by delaying to report it till late in the session, or by not reporting it at all.

In one or other of these ways nineteen-twentieths of the bills introduced meet their death, a death which the majority doubtless deserve, and the prospect of which tends to make members reckless as regards both the form and the substance of their proposals. A motion may be made in the House that the committee do report forthwith, and the House can of course restore the bill, when reported, to its original form. But these expedients rarely succeed, for few are the measures which excite sufficient interest to induce an impatient and overburdened assembly to take additional work upon its own shoulders or to overrule the decision of a committee.

The deliberations of committees are usually secret. Evidence is frequently taken with open doors, but the newspapers do not report it, unless the matter excite public interest; and even the decisions arrived at are often noticed in the briefest way. It is out of order to canvass the proceedings of a committee in the House until they have been formally reported to it; and the report submitted does not usually state how the members have voted, or contain more than a very curt outline of what has passed. No member speaking in the House is entitled to reveal anything further.

A committee have technically no right to initiate a bill, but as they can either transform one referred to them, or, if none has been referred which touches the subject they seek to deal with, can procure one to be brought in and referred to them, their command of their own province is unbounded. Hence the character of all the measures that may be passed or even considered by the House upon a particular branch of legislation depends on the composition of the committee concerned with that branch. Some committees, such as those on naval and military affairs, and those on the expenditure of the several departments, deal with administration rather than legislation. They have power to summon the officials of the departments before them, and to interrogate them as to their methods and conduct. Authority they have none, for officials are responsible only to their chief, the President; but the power of questioning is sufficient to check if not to guide the action of a department, since imperative statutes may follow, and the department, sometimes desiring legislation and always desiring money, has strong motives for keeping on good terms with those who control legislation and the purse. It is through these committees chiefly that the executive and legislative branches of government touch one another. Yet the contact, although the most important thing in a government, is the thing which the nation least notices, and has the scantiest means of watching.

The scrutiny to which the administrative committees subject the departments is so close and constant as to occupy much of the time of the officials and seriously interfere with their duties. Not only are they often summoned to give evidence: they are required to furnish minute reports on matters which a member of

Congress could ascertain for himself. Nevertheless the House committees are not certain to detect abuses or peculation, for special committees of the Senate have repeatedly unearthed dark doings which had passed unsuspected the ordeal of a House investigation. After a bill has been debated and amended by the committee it is reported back to the House, and is taken up when that committee is called in its order. One hour is allowed to the member whom his fellow committee-men have appointed to report. He seldom uses the whole of this hour, but allots part of it to other members, opponents as well as friends, and usually concludes by moving the previous question. This precludes subsequent amendments and leaves only an hour before the vote is taken. As on an average each committee (excluding the two or three great ones) has only two hours out of the whole ten months of Congress allotted to it to present and have discussed all its bills, it is plain that few measures can be considered, and each but shortly, in the House. The best chance of pressing one through is under the rule which permits the suspension of standing orders by a two-thirds majority during the last six days of the session.

What are the results of this system?

It destroys the unity of the House as a legislative body. Since the practical work of shaping legislation is done in the committees, the interest of members centres there, and they care less about the proceedings of the whole body. It is as a committee man that a member does his real work. In fact the House has become not so much a legislative assembly as a huge panel from which committees are selected.

It prevents the capacity of the best members from being brought to bear upon any one piece of legislation,

however important. The men of most ability and experience are chosen to be chairmen of the committees, or to sit on the two or three greatest. For other committees there remains only the rank and file of the House, a rank and file half of which is new at the beginning of each Congress. Hence every committee (except the aforesaid two or three) is composed of ordinary persons, and it is impossible, save by creating a special select committee, to get together what would be called in England "a strong committee," *i.e.* one where half or more of the members are exceptionally capable. The defect is not supplied by discussion in the House, for there is no time for such discussion.

It cramps debate. Every foreign observer has remarked how little real debate, in the European sense, takes place in the House of Representatives. The very habit of debate, the expectation of debate, the idea that debate is needed, have vanished, except as regards questions of revenue and expenditure, because the centre of gravity has shifted from the House to the committees.

It lessens the cohesion and harmony of legislation. Each committee goes on its own way with its own bills just as though it were legislating for one planet and the other committees for others. Hence a want of policy and method in congressional action. The advance is haphazard; the parts have little relation to one another or to the whole.

It gives facilities for the exercise of underhand and even corrupt influence. In a small committee the voice of each member is well worth securing, and may be secured with little danger of a public scandal. The press cannot, even when the doors of committee rooms stand open, report the proceedings of fifty bodies; the eye of the nation cannot follow and mark

what goes on within them; while the subsequent proceedings in the House are too hurried to permit a ripping up there of suspicious bargains struck in the purlieus of the Capitol, and fulfilled by votes given in a committee. As will be seen subsequently, I do not think that corruption, in its grosser forms, is rife at Washington. When it appears, it appears chiefly in the milder form of reciprocal jobbing or (as it is called) "log-rolling." But the arrangements of the committee system have produced and sustain the class of professional "lobbyists," men, and women too, who make it their business to "see" members and procure, by persuasion, importunity, or the use of inducements, the passing of bills, public as well as private, which involve gain to their promoters.

It reduces responsibility. In England, if a bad Act is passed or a good bill rejected, the blame falls primarily upon the ministry in power whose command of the majority would have enabled them to defeat it, next upon the party which supported the ministry, then upon the individual members who are officially recorded to have "backed" it and voted for it in the House. The fact that a select committee recommended it—and comparatively few bills pass through a select committee—would not be held to excuse the default of the ministry and the majority. But in the United States there is no ministry to be blamed, for the cabinet officers do not sit in Congress; the House cannot be blamed because it has only followed the decision of its committee; the committee is a comparatively obscure body, whose members are usually too insignificant to be worth blaming. The chairman is often a man of note, but the people have no leisure to watch fifty chairmen, they know Congress and Congress only; they cannot follow the acts of

those to whom Congress chooses to delegate its functions. No discredit attaches to the dominant party, because they could not control the acts of the eleven men in the committee room. Thus public displeasure rarely finds a victim, and everybody concerned is relieved from the wholesome dread of damaging himself and his party by negligence, perversity, or dishonesty. Only when a scandal has arisen so serious as to demand investigation is the responsibility of the member to his constituents and the country brought duly home.

It lowers the interests of the nation in the proceedings of Congress.[1] Except in exciting times, when large questions have to be settled, the bulk of real business is done not in the great hall of the House but in this labyrinth of committee rooms and the lobbies that surround them. What takes place in view of the audience is little more than a sanction, formal indeed but hurried and often heedless, of decisions procured behind the scenes, whose mode and motives remain undisclosed. Hence people cease to watch Congress with that sharp eye which every principal ought to keep fixed on his agent. Acts pass unnoticed, whose results

[1] "The doubt and confusion of thought which must necessarily exist in the minds of the vast majority of voters as to the best way of exerting their will in influencing the action of an assembly whose organization is so complex, whose acts are apparently so haphazard, and in which responsibility is spread so thin, throws constituencies into the hands of local politicians who are more visible and tangible than are the leaders of Congress, and generates the while a profound distrust of Congress as a body whose actions cannot be reckoned beforehand by any standard of promises made at elections or any programmes announced by conventions. Constituencies can watch and understand a few banded leaders who display plain purposes and act upon them with promptness; but they cannot watch or understand forty odd standing committees, each of which goes its own way in doing what it can without any special regard to the pledges of either of the parties from which its membership is drawn."—Woodrow Wilson, *Congressional Government*, a lucid and interesting book from which I have derived much help in this and the two following chapters.

are in a few months discovered to be so grave that the newspapers ask how it happened that they were allowed to pass.

The country of course suffers from the want of the light and leading on public affairs which debates in Congress ought to supply. But this is perhaps more fairly chargeable to defects of the House which the committees are designed to mitigate than to the committees themselves. The time which the committee work leaves for the sittings of the House is long enough to permit due discussion did better arrangements exist for conducting it.

It throws power into the hands of the chairmen of committees, especially, of course, of those which deal with finance and with great material interests. They become practically a second set of ministers, before whom the departments tremble, and who, though they can neither appoint nor dismiss a post-master or a tide-waiter, can by legislation determine the policy of the branch of administration which they oversee. This power is not necessarily accompanied by responsibility, because like everything else about the committees, it is largely exercised in secret. Besides, as an able writer remarks, "the more power is divided, the more irresponsible it becomes. The petty character of the leadership of each committee contributes towards making its despotism sure by making its duties uninteresting."[1]

It enables the House to deal with a far greater number of measures and subjects than could otherwise be overtaken; and has the advantage of enabling evidence to be taken by those whose duty it is to re-shape or amend a bill. It replaces the system of interrogating ministers in the House which prevails in most European

[1] *Congressional Government*, p. 94.

chambers; and enables the working of the administrative departments to be minutely scrutinized.

It sets the members of the House to work for which their previous training has fitted them much better than for either legislating or debating "in the grand style." They are shrewd keen men of business, apt for talk in committee, less apt for wide views of policy and elevated discourse in an assembly. The committees are therefore good working bodies, but bodies which confirm congressmen in the intellectual habits they bring with them instead of raising them to the higher platform of national questions and interests.

On the whole, it may be said that under this system the House despatches a vast amount of work and does the negative part of it, the killing off of worthless bills, in a thorough way. Were the committees abolished and no other organization substituted, the work could not be done. But much of it, including most of the private bills, ought not to come before Congress at all; and the more important part of what remains, viz. public legislation, is dealt with by methods securing neither the pressing forward of the measures most needed, nor the due debate of those that are pressed forward.

Why, if these mischiefs exist, is the system of committee legislation maintained?

It is maintained because none better has been, or, as most people think, can be devised. "We have," say the Americans, "three hundred and twenty-five members in the House, most of them eager to speak, nearly all of them giving constant attendance. The bills brought in are so numerous that in our two sessions, one of seven or eight months, the other of three months, not one-twentieth could be fairly discussed on second reading or in committee of the Whole. If even this twentieth

were discussed, no time would remain for supervision of the departments of State. That supervision itself must, since it involves the taking of evidence, be conducted by committees and not by the whole House. In England you have one large and strong committee, viz. the ministry of the day, which undertakes all the more important business, and watches even the bills of private members. Your House of Commons could not work for a single sitting without such a committee, as is proved by the fact than when you are left for a little without a ministry, the House adjourns. We cannot have such a committee, because no office-holder sits in Congress. Neither can we organize the House under leaders, because prominent men have among us little authority, since they are unconnected with the executive, and derive no title from the people.[1] Neither can we create a ruling committee of the majority, because this would be disliked as an undemocratic and tyrannical institution. Hence our only course is to divide the unwieldy multitude into small bodies capable of dealing with particular subjects. Each of them is no doubt powerful in its own sphere, but that sphere is so small that no grave harm can result. The Acts passed may not be the best possible; the legislation of the year may resemble a patchwork quilt, where each piece is different in colour and texture from the rest.

[1] In England the prime minister and the leader of the Opposition (often an ex-prime minister) have been recognized as leaders not only by the candidates who at the last preceding general election have declared their willingness to support one or other, but also by the rank and file of their respective parties. These leaders have thus a sort of right to the allegiance of their followers, though a right which they may forfeit. In America no candidate pledges himself to support a particular congressional leader. It would be thought unbecoming in him to do so. His allegiance is to the party, and his constituents do not expect him to support any given person, however eminent.

But as we do not need much legislation, and as nearly the whole field of ordinary private law lies outside the province of Congress, the mischief is slighter than you Europeans expect. If we made legislation easier, we might have too much of it; and in trying to give it the more definite character you suggest, we might make it too bold and sweeping. Be our present system bad or good, it is the only system possible under our Constitution, and the fact that it was not directly created by that instrument, but has been evolved by the experience of a hundred years, shows how strong must be the tendencies whose natural working has produced it."

NOTE TO CHAPTER XV.

LIST of STANDING COMMITTEES of the House in the Fiftieth Congress, First Session. (Corrected to Jan. 15, 1888.)

On Elections; Ways and Means; Appropriations; Judiciary; Banking and Currency; Coinage, Weights and Measures; Commerce; Rivers and Harbours; Merchant Marine and Fisheries; Agriculture; Foreign Affairs; Military Affairs; Naval Affairs; Post Office and Post Roads; Public Lands; Indian Affairs; Territories; Railways and Canals; Manufactures; Mines and Mining; Public Buildings and Grounds; Pacific Railroads; Levees and Improvements of the Mississippi River; Education; Labour; Militia; Patents; Invalid Pensions; Pensions; Claims; War Claims; Private Land Claims; District of Columbia; Revision of the Laws; Expenditures in the State Department; Do., Treasury Department; Do., War Department; Do., Navy Department; Do., Post Office Department; Do., Interior Department; Do., Department of Justice; Do., Public Buildings; Rules; Accounts; Mileage; Library; Printing; Enrolled Bills; Reform in the Civil Service; Election of President, Vice-President, and Representatives; Eleventh Census; Indian Depredation Claims; Ventilation and Acoustics; Alcoholic Liquor Traffic.

There were also in Jan. 1888 seven Select Committees.

CHAPTER XVI

CONGRESSIONAL LEGISLATION

LEGISLATION is more specifically and exclusively the business of Congress than it is the business of governing parliaments such as those of England, France, and Italy. We must therefore, in order to judge of the excellence of Congress as a working machine, examine the quality of the legislation which it turns out.

Acts of Congress are of two kinds, public and private. Passing by private acts for the present, though they occupy a large part of congressional time,[1] let us consider public acts. These are of two kinds, those which deal with the law or its administration, and those which deal with finance, that is to say, provide for the raising and application of revenue. I devote this chapter to the former class, and the next to the latter.

There are many points of view from which one may regard the work of legislation. I suggest a few only, in respect of which the excellence of the work may be tested; and propose to ask: What security do the legislative methods and habits of Congress offer for the attainment of the following desirable objects? viz.:—

[1] Some remarks on private bills will be found in Note A to this chapter at the end of this volume.

1. The excellence of the substance of a bill, *i.e.* its tendency to improve the law and promote the public welfare.

2. The excellence of the form of a bill, *i.e.* its arrangement and the scientific precision of its language.

3. The harmony and consistency of an act with the other acts of the same session.

4. The due examination and sifting in debate of a bill.

5. The publicity of a bill, *i.e.* the bringing it to the knowledge of the country at large, so that public opinion may be fully expressed regarding it.

6. The honesty and courage of the legislative assembly in rejecting a bill, however likely to be popular, which their judgment disapproves.

7. The responsibility of some person or body of persons for the enactment of a measure, *i.e.* the fixing on the right shoulders of the praise for passing a good, the blame for passing a bad, act.

The criticisms that may be passed on American practice under the preceding heads will be made clearer by a comparison of English practice. Let us therefore first see how English bills and acts stand the tests we are to apply to the work of Congress.

In England public bills fall into two classes,—those brought in by the ministry of the day as responsible advisers of the sovereign, and those brought in by private members. In point of law and in point of form there is no difference between these classes, and the only way of ascertaining to which class a given bill belongs is by looking to see whether the names on the back of it are those of ordinary private members or of the official servants of the Crown.[1] Practically there is

[1] If a private member after bringing in a bill accepts office under the Crown, custom requires that he should either induce his colleagues

all the difference in the world, because a government bill has behind it the responsibility of the ministry, and presumably the weight of the majority which keeps the ministry in office. The ministry dispose of a half or more of the working time of the House, and have therefore much greater facilities for pushing forward their bills. Nearly all the most important bills, which involve large political issues, are government bills, so that the hostile critic of a private member's bill will sometimes argue that the House ought not to permit the member to proceed with it, because it is too large for any unofficial hands. This premised, we may proceed to the seven points above mentioned.

1. In England, as the more important bills are government bills, their policy is sure to have been carefully weighed. The ministry have every motive for care, because the fortunes of a first-class bill are their own fortunes. If it is rejected, they fall. A specially difficult bill is usually framed by a committee of the cabinet, and then debated by the cabinet as a whole before it appears in Parliament. Minor bills are settled in the departments by the parliamentary head with his staff of permanent officials. A private member has not these advantages: but if he is wise he submits his bill before it is printed to three or four judicious friends, profits by their criticism, and obtains a promise of their support.

2. In England, government bills are prepared by the official government draftsmen, two eminent lawyers with several assistants, who constitute an office for this purpose. Private members who are lawyers often draft

to take it up, in which case it becomes a government bill, or else relinquish the charge of it to some private member.

their own bills; those who are not generally employ a barrister. The drafting of government bills has much improved of late years, and the faults of form observable in British Acts are chiefly due to amendments made in committee of the whole House, which are often prepared and inserted in a hurry.

3. The harmony of one government bill with others of the same session is secured by the care of the official draftsmen, as well as by the fact that all emanate from one and the same ministry. No such safeguards exist in the case of private members' bills, but it is of course the duty of the ministry to watch these legislative essays, and get Parliament to strike out of any one of them whatever is inconsistent with another measure passed or intended to be passed in the same session.

4. Difficult and complicated bills which raise no political controversy are sometimes referred to a select committee, which goes through them and reports them as amended to the House. They are afterwards considered, and often fully debated, first in committee of the Whole, and then by the House on the stage of report (*i.e.* report from committee of the Whole to the House). Latterly such bills have begun to be referred to what are called Grand Committees, *i.e.* committees of at least fifty appointed in each session for the consideration of particular kinds of business. Discussion in these committees replaces the discussion in committee of the Whole; but the bills come before the House on report for further debate. Many bills, however, never go before select or grand committees, but are dealt with by the House itself in the two last-mentioned stages. While measures which excite political feeling or touch any powerful

interest (such as that of landowners or railroads or liquor-dealers) are exhaustively debated, others may slip through unobserved. The enormous pressure of work and the prolixity with which some kinds of business are discussed, involve the hurrying other business through with scant consideration.

5. Except in the case of discussions at unseasonable hours, the proceedings of Parliament are so far reported in the leading newspapers and commented on by them that bills, even those of private members, generally become known to those whom they may concern. There is usually a debate on the second reading, and this debate attracts notice. Members often receive from persons previously unknown to them suggestions regarding pending measures.

6. A government bill is, by the law of its being, exposed to the hostile criticism of the Opposition, who have an interest in discrediting the ministry by disparaging their work. As respects private members' bills, it is the undoubted duty of some minister to watch them, and to procure their amendment or rejection if he finds them faulty. This duty is discharged less faithfully than might be wished, but perhaps as well as can be expected from weak human nature, often tempted to conciliate a supporter or an "interest" by allowing a measure to go through which ought to have been stopped.[1] Private members are generally alert in watching one another's bills; and the rules of the House of Commons enable them to defeat a measure by objecting to its progress at certain hours.

[1] Now and then a bill passes which sensible men of both parties disapprove, because its advocates are more strenuous than its opponents, and the notion that some popular sentiment favours it deters either party from resistance.

Responsibility for everything done in the House rests upon the ministry of the day, because they are the leaders of the majority. If they allow a private member to pass a bad bill, if they stop him when trying to pass a good bill, they are in theory no less culpable than if they pass a bad bill of their own. Accordingly, when the second reading of a measure of any consequence is moved, it is the duty of some member of the ministry to rise, with as little delay as possible, and state whether the ministry support it, or oppose it, or stand neutral. Standing neutral is, so far as responsibility to the country goes, practically the same thing as supporting. The Opposition, as an organized body, are not expected to express their opinion on any bills except those of high political import. Needless to say, private members are also held strictly responsible for the votes they give, these votes being all recorded and published next morning. Of course both parties claim praise or receive blame from the country in respect of their attitude towards bills of moment, and when a session has produced few or feeble Acts the Opposition charge the Ministry with sloth or incompetence.

The rules and usages I have described constitute valuable aids to legislation, and the quality of English and Scottish legislation, take it all and all, is good; that is to say, the statutes are such as public opinion demands, and are well drawn for the purposes they aim at. The chief complaints against the House of Commons as a legislative body[1] are that it is too indulgent to tediousness, and that, owing to its vast and multifarious

[1] Of course there are often blemishes of detail in Acts of Parliament, which might be removed in a second chamber, did England possess a second chamber well qualified for the duty of revision, and wishful to discharge it.

business, it leaves serious questions unsettled till they have grown more serious, and require remedies more violent than might have at first sufficed.

Let us now apply the same tests to the legislation of Congress. What follows refers primarily to the House, but is largely true of the Senate, because in the Senate also the committees play an important part.

The first difference which strikes us between Parliament and Congress is that in neither House of Congress are there any government bills. All measures are brought in by private members because all members are private. The nearest approach to the government bill of England is one brought in by a leading member of the majority in pursuance of a resolution taken in the congressional caucus of that majority. This seldom happens. One must therefore compare the ordinary congressional bill with the English private member's bill rather than with a government measure, and expect to find it marked by the faults that mark the former class. The second difference is that whereas in England the criticism and amendment of a bill takes place in committee of the Whole, in the House of Representatives it takes place in a small committee of sixteen members or less, usually of eleven. In the Senate also the committees do most of the work, but the committee of the Whole occasionally debates a bill pretty fully.

Premising these dissimilarities, I go to the seven points before mentioned.

1. The excellence of the substance of a bill introduced in Congress depends entirely on the wisdom and care of its introducer. He may, if self-distrustful, take counsel with his political allies respecting it. But there is no security for its representing any opinion or

knowledge but his own. It may affect the management of an executive department, but the introducing member does not command departmental information, and will, if the bill passes, have nothing to do with the carrying out of its provisions. On the other hand, the officials of the government cannot submit bills; and if they find a congressman willing to do so for them, must leave the advocacy and conduct of the measure entirely in his hands.

2. The drafting of a measure depends on the pains taken and skill exerted by its author. Senate bills are usually well drafted because many senators are experienced lawyers: House bills are often crude and obscure. There does not exist either among the executive departments or in connection with Congress, any legal office charged with the duty of preparing bills, or of seeing that the form in which they pass is technically satisfactory.

3. The only security for the consistency of the various measures of the same session is to be found in the fact that those which affect the same matter ought to be referred to the same committee. However, it often happens that there are two or more committees whose spheres of jurisdiction overlap, so that of two bills handling cognate matters, one may go to Committee A and the other to Committee B. Should different views of policy prevail in these two bodies, they may report to the House bills containing mutually repugnant provisions. There is nothing except unusual vigilance on the part of some member interested, to prevent both bills from passing. That mischief from this cause is not serious arises from the fact that out of the multitude of bills introduced, few are reported and still fewer become law.

4. The function of a committee of either House of

Congress extends not merely to the sifting and amending of the bills referred to it, but to practically re-drawing them, if the committee desires any legislation, or rejecting them by omitting to report them till near the end of the session if it thinks no legislation needed. Every committee is in fact a small bureau of legislation for the matters lying within its jurisdiction. It has for this purpose the advantage of time, of the right to take evidence, and of the fact that some of its members have been selected from their knowledge of or interest in the topics it has to deal with. On the other hand, it suffers from the non-publication of its debates, and from the tendency of all small and secret bodies to intrigues and compromises, compromises in which general principles of policy are sacrificed to personal feeling or selfish interest. Bills which go in black or white come out gray. The member who has introduced a bill may not have a seat on the committee, and may therefore be unable to protect his offspring. Other members of the House, masters of the subject but not members of the committee, can only be heard as witnesses. Although therefore there are full opportunities for the discussion of the bill by the committee, it often emerges in an unsatisfactory form, or is quietly suppressed, because there is no impetus of the general opinion of the House or the public to push it through. When the bill comes back to the House the chairman or other reporting member of the committee generally moves the previous question, after which no amendment can be offered. Debate ceases and the bill is promptly passed or lost. In the Senate there is a better chance of discussion, for the Senate, having more time and fewer speakers, can review to some real purpose the findings of its committees.

5. As there is no debate on the introduction or on the second reading of a bill, the public is not necessarily apprised of the measures which are before Congress. An important measure is of course watched by the newspapers and so becomes known: minor measures go unnoticed.

6. The general good-nature of Americans, and the tendency of members of their legislatures to oblige one another by doing reciprocal good turns, dispose people to let any bill go through which does not injure the interest of a party or of a person. Such good-nature counts for less in a committee, because a committee has its own views and gives effect to them. But in the House there are few views, though much impatience. The House has no time to weigh the merits of a bill reported back to it. Members have never heard it debated. They know no more of what passed in the committee than the report tells them. If the measure is palpably opposed to their party tenets, the majority will reject it: if no party question arises they usually adopt the view of the committee.

7. What has been said already will have shown that except as regards bills of great importance, or directly involving party issues, there can be little effective responsibility for legislation. The member who brings in a bill is not responsible, because the committee generally alters his bill. The committee is little observed and the details of what passed within the four walls of its room are not published. The great parties in the House are but faintly responsible, because their leaders are not bound to express an opinion, and a vote taken on a non-partisan bill is seldom a strict party vote. Individual members are no doubt responsible, and a member who votes against a popular

measure, one for instance favoured by the working men, will suffer for it.[1] But the responsibility of individuals, most of them insignificant, half of them destined to vanish, like snow-flakes in a river, at the next election, gives little security to the people.

The best defence that can be advanced for this system is that it has been naturally evolved as a means of avoiding worse mischiefs. It is really a plan for legislating by a number of commissions. Each commission, receiving suggestions in the shape of bills, taking evidence upon them, and sifting them in debate, frames its measures and lays them before the House in a shape which seems designed to make amendment in details needless, while leaving the general policy to be accepted or rejected by a simple vote of the whole body. In this last respect the plan may be compared with that of the Romans during the Republic, whose general assembly of the people approved or disapproved of a bill as a whole, without power of amendment, a plan which had the advantage of making laws clear and simple. At Rome, however, bills could be proposed only by a magistrate upon his official responsibility; they were therefore comparatively few and sure to be carefully drawn. The members of American legislative commissions have no special training, no official experience, little praise or blame to look for, and no means of securing that the overburdened House will ever come to a vote on their proposals. There is no more agreement between the views of one commission and another than what may result from the majority in both belong-

[1] The member who has taken this course is the worse off, because he rarely has an opportunity of explaining by a speech in the House his reason for his vote, and is therefore liable to the imputation of having been "got at" by capitalists.

ing to the same party. Hence, as Mr. Wilson observes, "The legislation of a session does not represent the policy of either the majority or the minority: it is simply an aggregate of the bills recommended by committees composed of members from both sides of the House, and it is known to be usually not the work of the majority men upon the committees, but compromise conclusions bearing some shade or tinge of each of the variously coloured opinions and wishes of the committee men of both parties. Most of the measures which originate with the committees are framed with a view of securing their easy passage by giving them as neutral and inoffensive a character as is possible. The manifest object is to draw them to the liking of all factions. Hence neither the failure nor the success of any policy inaugurated by one of the committees can fairly be charged to the account of either party."[1]

Add to the conditions above described the fact that the House in its few months of life has not time to deal with one-twentieth of the twelve thousand bills which are thrown upon it, that it therefore drops the enormous majority unconsidered, though some of the best may be in this majority, and passes many of those which it does pass by a suspension of the rules which leaves everything to a single vote,[2] and the marvel comes to be, not that legislation is faulty, but that an intensely practical people tolerates such defective machinery. Some reasons may be suggested tending to explain this phenomenon.

Legislation is a difficult business in all free countries,

[1] *Congressional Government*, pp. 99-101.

[2] This can be done by a two-thirds vote during the last six days of a session and on the first and third Mondays of each month.

and perhaps more difficult the more free the country is, because the discordant voices are more numerous and less under control. America has sometimes sacrificed practical convenience to her dislike to authority.

The Americans surpass all other nations in their power of making the best of bad conditions, getting the largest results out of scanty materials or rough methods. Many things in that country work better than they ought to work, so to speak, or could work in any other country, because the people are shrewdly alert in minimizing such mischiefs as arise from their own haste or heedlessness, and have a great capacity for self-help.

Aware that they have this gift, the Americans are content to leave their political machinery unreformed. Persons who propose comprehensive reforms are suspected as theorists and crotchet-mongers. The national inventiveness, active in the spheres of mechanics and money-making, spends little of its force on the details of governmental methods.

The want of legislation on topics where legislation is needed breeds fewer evils than would follow in countries like England or France where Parliament is the only law-making body. The powers of Congress are limited to comparatively few subjects: its failures do not touch the general well-being of the people, nor the healthy administration of the ordinary law.

The faults of bills passed by the House are often cured by the Senate, where discussion is more leisurely and thorough. The committee system produces in that body also some of the same flabbiness and colourlessness in bills passed. But the blunders, whether in substance or of form, of the one chamber are frequently corrected by the other, and many bad bills fail owing to a division of opinion between the Houses.

The President's veto kills off some vicious measures. He does not trouble himself about defects of form; but where a bill seems to him opposed to sound policy, it is his constitutional duty to disapprove it, and to throw on Congress the responsibility of passing it "over his veto" by a two-thirds vote. A good President accepts this responsibility.

CHAPTER XVII

CONGRESSIONAL FINANCE

FINANCE is a sufficiently distinct and important department of legislation to need a chapter to itself; nor does any legislature devote a larger proportion of its time than does Congress to the consideration of financial bills. These are of two kinds: those which raise revenue by taxation, and those which direct the application of the public funds to the various expenses of the government. At present Congress raises all the revenue it requires by indirect taxation,[1] and chiefly by duties of customs and excise; so taxing bills are practically tariff bills, the excise duties being comparatively little varied from year to year.

The method of passing both kinds of bills is unlike that of most European countries. In England, with which, of course, America can be most easily compared, although both the levying and the spending of money are absolutely under the control of the House of Commons, the House of Commons originates no proposal for either. It never either grants money or orders the raising of money except at the request of the Crown. Once a year the Chancellor of the Exchequer

[1] During the Civil War, direct taxes were levied; and many other kinds of taxes besides those mentioned in the text have been imposed at different times.

lays before it, together with a full statement of the revenue and expenditure of the past twelve months, estimates of the expenditure for the coming twelve months, and suggestions for the means of meeting that expenditure by taxation or by borrowing. He embodies these suggestions in resolutions on which, when the House has accepted them, bills are grounded imposing certain taxes or authorizing the raising of a loan. The House may of course amend the bills in details, but no private member ever proposes a taxing bill, for it is no concern of any one's except the ministry to fill the public treasury.[1] The estimates prepared by the several administrative departments (Army, Navy, Office of Works, Foreign Office, etc.), and revised by the Treasury, specify the items of proposed expenditure with much particularity, and fill three or more bulky volumes, which are delivered to every member of the House. These estimates are debated in committee of the whole House, explanations being required from the ministers who represent the Treasury and the several departments, and are passed in a long succession of separate votes.[2] Members may propose to reduce any particular grants, but not to

[1] Of course a private member may carry a resolution involving additional expenditure; but even this is at variance with the stricter constitutional doctrine and practice; a doctrine regarded by the statesmen of the last generation as extremely valuable, because it restrains the propensity of a legislature to yield to demands emanating from sections or classes, which may entail heavy and perhaps unprofitable charges on the country. See the observations of the First Lord of the Treasury in the House of Commons, March 22, 1886.

[2] Complaints are sometimes made that these votes are not discussed with sufficient fulness and minuteness, and it has been proposed to create several special standing committees to examine each class of them more closely. This might be a desirable addition. Three such committees have recently been appointed. But even under the present system there are many useful financial debates, by which some abuses are checked and in which valuable suggestions are made.

increase them; no money is ever voted for the public service except that which the Crown has asked for through its ministers. The Crown must never ask for more than it actually needs, and hence the ministerial proposals for taxation are carefully calculated to raise just so much money as will cover the estimated expenses for the coming year. It is reckoned almost as great a fault in the finance minister if he has needlessly overtaxed the people, as if he has so undertaxed them as to be left with a deficit. If at the end of a year a substantial surplus appears, the taxation for next year is reduced in proportion, supposing that the expenditure remains the same. Every credit granted by Parliament expires of itself at the end of the financial year.

In the United States the Secretary of the Treasury sends annually to Congress a report containing a statement of the national income and expenditure and of the condition of the public debt, together with remarks on the system of taxation and suggestions for its improvement. He also sends what is called his Annual Letter, enclosing the estimates, framed by the various departments, of the sums needed for the public services of the United States during the coming year. So far the Secretary is like a European finance minister, except that he communicates with the chamber on paper instead of making his statement and proposals orally. But here the resemblance stops. Everything that remains in the way of financial legislation is done solely by Congress and its committees, the executive having no further hand in the matter.

The business of raising money belongs to one committee only, the standing committee of Ways and Means, consisting of eleven members. Its chairman is always a leading man in the party which commands a

majority in the House. This committee prepares and reports to the House the bills needed for imposing or continuing the various customs duties, excise duties, etc. The report of the Secretary has been referred by the House to this committee, but the latter does not necessarily base its bills upon or in any way regard that report. Neither does it in preparing them start from an estimate of the sums needed to support the public service. It does not, because it cannot: for it does not know what grants for the public service will be proposed by the spending committees, since the estimates submitted in the Secretary's letter furnish no trustworthy basis for a guess. It does not, for the further reason that the primary object of customs duties has for many years past been not the raising of revenue, but the protection of American industries by subjecting foreign products to a very high tariff. At present there are enormous duties on many classes of raw materials, and on nearly all classes of manufactured goods, including even books and works of art. This tariff brings in an income far exceeding the current needs of the government. Nearly two-thirds of the war debt having been paid off, the fixed charges have shrunk to one-third of what they were when the present tariff was imposed, yet this tariff remains with few modifications, and surpluses accumulate year after year in the national treasury. The committee of Ways and Means has therefore no motive for adapting taxation to expenditure. The former will be always in excess so long as the protective tariff stands, and the protective tariff stands for commercial or political reasons unconnected with national finance.[1]

[1] Hitherto there has always been a means of getting rid of surpluses by paying off debt; but as financiers are now beginning to hold that a

When the revenue bills come to be debated in committee of the whole House similar causes prevent them from being scrutinized from the purely financial point of view. Debate turns on those items of the tariff which involve gain or loss to influential groups. Little inquiry is made as to the amount needed and the adaptation of the bills to produce that amount and no more. It is the same with ways and means bills in the Senate. Communications need not pass between the committees of either House and the Treasury. The person most responsible, the person who most nearly corresponds to an English Chancellor of the Exchequer, or a French Minister of Finance, is the chairman of the House committee of Ways and Means. But he stands in no official relation to the Treasury, and is not required to exchange a word or a letter with its staff. Neither, of course, can he count on a majority in the House. Though he is a leading man he is not a leader, *i.e.* he has no claim on the votes of his own party, many of whom may (as happened to Mr. Morrison in 1886) disapprove of and cause the defeat of his proposals. That gentleman was chairman of the committee of Ways and Means, and perhaps, after the Speaker, the most considerable person in the Democratic majority. But he was beaten in his attempted reform of the tariff.

The business of spending money belongs primarily to two standing committees, the old committee on

certain portion of the debt ought to be kept on foot for banking and currency purposes, much discussion has arisen as to how the accumulating balance shall be disposed of. Hence the issues of commercial policy, issues affecting the great manufacturing industries, dwarf questions of revenue proper. The committee considers not which is the best and cheapest means of raising a given sum, but how the tariff will affect protected industries. Since there is no fear of a deficit, it drafts its bills with no view to the raising of a particular sum, and does not care to calculate the exact income the taxes will produce.

Appropriations and the new committee on Rivers and Harbours, created in 1883. The committee on appropriations starts from, but does not adopt, the estimates sent in by the Secretary of the Treasury, for the appropriation bills it prepares usually make large and often reckless reductions in these estimates. The Rivers and Harbours committee proposes grants of money for what are called "internal improvements," nominally in aid of navigation, but practically in order to turn a stream of public money into the State or States where each "improvement" is to be executed. More money is wasted in this way than what the parsimony of the Appropriations committee can save. There are several committees on the departments, such as those on the navy, the army, the judiciary. There is the committee on pensions, a source of infinite waste.[1] Each of these proposes grants of money, not knowing nor heeding what is being proposed by other committees, and guided by the executive no further than the members choose. All the expenditures recommended must be met by appropriation bills, but into their propriety the Appropriations committee cannot inquire.

Every revenue bill must, of course, come before the House; and the House, whatever else it may neglect, never neglects the discussion of taxation and money grants. These are discussed as fully as the pressure of work permits, and are often added to by the insertion of fresh items, which members interested in getting money voted for a particular purpose or locality suggest. These bills then go to the Senate, which forthwith refers them to its committees. The Senate committee on finance deals with revenue-raising bills; the committee on appropriations with supply bills. Both sets then come before the

[1] The expenditure on pensions was in 1887 $75,000,000 (£15,000,000).

whole Senate. Although it cannot initiate appropriation bills, the Senate has long ago made good its claim to amend them, and does so without stint, adding new items and often greatly raising the total of the grants. When the bills go back to the House, the House usually rejects the amendments; the Senate adheres to them, and a Conference committee is appointed, consisting of three senators and three members of the House, by which a compromise is settled, hastily and in secret, and accepted, generally in the last days of the session, by a hard-pressed but reluctant House. Even as enlarged by this committee, the supply voted is usually found inadequate, so a Deficiency bill is introduced in the following session, including a second series of grants to the departments.

The European reader will ask how all this is or can be done by Congress without frequent communication from or to the executive government. There are such communications, for the ministers, anxious to secure appropriations adequate for their respective departments, talk to the chairmen and appear before the committees to give evidence as to departmental needs. But in Congress itself they never now appear, nor does Congress look to them for guidance as in the early days it looked to Hamilton and Gallatin. If the House cuts down their estimates they turn to the Senate and beg it to restore the omitted items; if the Senate fail them, the only resource left is a Deficiency bill in the next session. If one department is so starved as to be unable to do its work, while another obtains lavish grants which invite jobbery or waste, it is the committees, not the executive, whom the people ought to blame. If, by a system of log-rolling, vast sums are wasted upon useless public works, no minister has

any opportunity to interfere, any right to protest. A minister cannot, as in England, bring Congress to reason by a threat of resignation, for it would make no difference to Congress if the whole cabinet were to resign.[1]

What I have stated may be summarized as follows:

There is practically no connection between the policy of revenue raising and the policy of revenue spending, for these are left to different committees whose views may be opposed, and the majority in the House has no recognized leaders to remark the discrepancies or make one or other view prevail. In the forty-ninth Congress (1885-1887) a strong free-trader was chairman of the tax-proposing committee on Ways and Means, while a strong protectionist was chairman of the spending committee on Appropriations.

There is no relation between the amount proposed to be spent in any one year, and the amount proposed to be raised. But for the fact that the high tariff produces a large annual surplus, a financial breakdown would speedily ensue.

The knowledge and experience of the permanent officials either as regards the productivity of taxes, and the incidental benefits or losses attending their collection, or as regards the nature of various kinds of expenditure and their comparative utility, can be turned to account only by interrogating these officials before the committees. Their views are not stated in the House by a parliamentary chief, nor tested in debate by arguments addressed to him which he must there and then answer.

Little check exists on the tendency of members to deplete the public treasury by securing grants for their

[1] Unless of course Congress should be so clearly in the wrong that the people were roused to vigorous disapproval of its conduct.

friends or constituents, or by putting through financial jobs for which they are to receive some private consideration. If either the majority of the committee on Appropriations or the House itself suspects a job, the grant proposed may be rejected. But it is the duty of no one in particular to scent out a job, and to defeat it by public exposure.

The nation becomes so puzzled by a financial policy varying from year to year, and controlled by no responsible leaders, as to feel diminished interest in congressional discussions and diminished confidence in Congress.[1]

The result on the national finance is unfortunate. A thoughtful American publicist remarks, "So long as the debit side of the national account is managed by one set of men, and the credit side by another set, both sets working separately and in secret without public responsibility, and without intervention on the part

[1] "The noteworthy fact that even the most thorough debates in Congress fail to awaken any genuine or active interest in the minds of the people has had its most striking illustrations in the course of our financial legislation, for though the discussions which have taken place in Congress upon financial questions have been so frequent, so protracted, and so thorough, engrossing a large part of the time of the House on their every recurrence, they seem in almost every instance to have made scarcely any impression upon the public mind. The Coinage Act of 1873, by which silver was demonetized, had been before the country many years ere it reached adoption, having been time and again considered by committees of Congress, time and again printed and discussed in one shape or another, and having finally gained acceptance apparently by sheer persistence and importunity. The Resumption Act of 1875, too, had had a like career of repeated considerations by committees, repeated printings and a full discussion by Congress, and yet when the Bland Silver Bill of 1878 was on its way through the mills of legislation, some of the most prominent newspapers of the country declared with confidence that the Resumption Act had been passed inconsiderately and in haste; and several members of Congress had previously complained that the demonetization scheme of 1873 had been pushed surreptitiously through the courses of its passage, Congress having been tricked into accepting it, doing it scarcely knew what."—Woodrow Wilson, *Congressional Government*, p. 148.

of the executive official who is nominally responsible; so long as these sets, being composed largely of new men every two years, give no attention to business except when Congress is in session, and thus spend in preparing plans the whole time which ought to be spent in public discussion of plans already matured, so that an immense budget is rushed through without discussion in a week or ten days—just so long the finances will go from bad to worse, no matter by what name you call the party in power. No other nation on earth attempts such a thing, or could attempt it without soon coming to grief, our salvation thus far consisting in an enormous income, with practically no drain for military expenditure."

It may be replied to this criticism that the enormous income, added to the fact that the tariff is imposed for protection rather than for revenue, is not only the salvation of the United States Government under the present system, but also the cause of that system. Were the tariff framed with a view to revenue only, no higher taxes would be imposed than the public service required, and a better method of balancing the public accounts would follow. This is true. The present state of things is evidently exceptional. America is the only country in the world whose difficulty is not to raise money but to spend it.[1] Still, as our critic remarks, Congress is contracting lax habits, and ought to change them.

[1] The Report of the Secretary of the Treasury for 1887 states the surplus in the treasury on 1st December of that year at $55,000,000, and estimates the surplus for the financial year ending 30th June 1888 under the law then in force at $140,000,000. For twenty-two years there have been surpluses, the smallest of $2,344,000 in 1874, the largest of $145,543,000 in 1882. The surplus taxation for the year ending 30th June 1888 was $113,000,000. The total estimated revenue of 1887-88 was $383,000,000. The receipts from customs alone were greater by $24,000,000 in 1887 than in 1886.

Considering these faults, and considering that it is by preaching an adoption of British methods that the wisest American reformers are trying to cure the defects in the financial administration of Congress, it is odd that English publicists should at the same moment be suggesting the American system as a model for imitation by the House of Commons. The present British plan is probably open to the charge of not securing a full parliamentary control either of the expenses or of the administrative methods of the spending departments. But the arrangements of Congress seem, so far as an English observer can judge, less conducive to economy as well as to efficiency than those of Parliament.

How comes it, if all this be true, that the finances of America are so flourishing, and in particular that the war debt has been paid off with such regularity and speed that from $3,000,000,000 (£600,000,000) in 1865, it had sunk to less than $1,200,000,000 (£240,000,000) in 1887? Does not so brilliant a result speak of a continuously wise and skilful management of the national revenue?

The paying off of the debt seems to be due to the following causes:—

To the prosperity of the country which, with one interval of trade depression, has for twenty years been developing its amazing natural resources so fast as to produce an amount of wealth which is not only greater, but more widely diffused through the population, than in any other part of the world.

To the spending habits of the people, who allow themselves luxuries such as the masses enjoy in no other country, and therefore pay more than any other people in the way of indirect taxation. The fact that Federal revenue is raised by duties of customs and excise

makes the people far less sensible of the pressure of taxation than they would be did they pay directly.

To the absence of the military and naval charges which press so heavily on European states.

To the maintenance of an exceedingly high tariff at the instance of numerous interested persons who have obtained the public ear and can influence Congress. Without expressing any opinion as to whether the policy of Protection be or be not sound, one may observe that to its acceptance, more perhaps than to any deliberate conviction that the debt ought to be paid off, has been due the continuance of a tariff whose huge and constant surpluses have enabled the debt to be reduced.

Europeans, admiring and envying the rapidity with which the war debt has been reduced, have been disposed to credit the Americans with brilliant financial skill. That, however, which was really admirable in the conduct of the American people was not their judgment in selecting particular methods for raising money, but their readiness to submit during and immediately after the war to unprecedentedly heavy taxation. The interests (real or supposed) of the manufacturing classes have caused the maintenance of the tariff then imposed; nature, by giving the people a spending power which has rendered the tariff marvellously productive, has done the rest.

Under the system of congressional finance here described America wastes millions annually. But her wealth is so great, her revenue so elastic, that she is not sensible of the loss. She has the glorious privilege of youth, the privilege of committing errors without suffering from their consequences.

CHAPTER XVIII

THE RELATIONS OF THE TWO HOUSES

THE creation by the Constitution of 1789 of two chambers in the United States, in place of the one chamber which existed under the Confederation, has been usually ascribed by Europeans to mere imitation of England; and one learned writer goes so far as to suggest that if England had possessed three chambers, like the States General of France, or four, like the Diet of Sweden, a crop of three-chambered or four-chambered legislatures would, in obedience to the example of happy and successful England, have sprung up over the world. There were, however, better reasons than deference to English precedents to justify the division of Congress into two houses and no more; and so many indubitable instances of such a deference may be quoted that there is no need to hunt for others. Not to dwell upon the fact that there were two chambers in all but two[1] of the thirteen original States, the Convention of 1787 had two solid motives for fixing on this number, a motive of principle and theory, a motive of immediate expediency.

The chief advantage of dividing a legislature into

[1] Pennsylvania and Georgia; the former of which added a Senate in 1789, the latter in 1790. See *post*, Chapter XXXIX. on State Legislatures.

two branches is that the one may check the haste and correct the mistakes of the other. This advantage is purchased at the price of some delay, and of the weakness which results from a splitting up of authority. If a legislature be constituted of three or more branches, the advantage is scarcely increased, the delay and weakness are immensely aggravated. Two chambers can be made to work together in a way almost impossible to more than two. As the proverb says, "Two's company, three's none." If there be three chambers, two are sure to intrigue and likely to combine against the third. The difficulties of carrying a measure without sacrificing its unity of principle, of fixing responsibility, of securing the watchful attention of the public, serious with two chambers, become enormous with three or more.

To these considerations there was added the practical ground that the division of Congress into two houses supplied a means of settling the dispute which raged between the small and the large States. The latter contended for a representation of the States in Congress proportioned to their respective populations, the former for their equal representation as sovereign commonwealths. Both were satisfied by the plan which created two chambers in one of which the former principle, in the other of which the latter principle was recognized. The country remained a federation in respect of the Senate, it became a nation in respect of the House: there was no occasion for a third chamber.

The respective characters of the two bodies are wholly unlike those of the so-called upper and lower chambers of Europe. In Europe there is always a difference of political complexion, generally resting on a difference in personal composition. There the upper chamber represents the aristocracy of the country, or

the men of wealth, or the high officials, or the influence of the Crown and Court; while the lower chamber represents the multitude. Between the Senate and the House there is no such difference. Both equally represent the people, the whole people, and nothing but the people. The individual members come from the same classes of the community; and though there are more rich men (in proportion to numbers) in the Senate than in the House, the influence of capital is not markedly greater. Both have been formed by the same social influences: and the social pretensions of a senator expire with his term of office. Both are possessed by the same ideas, governed by the same sentiments, equally conscious of their dependence on public opinion. The one has never been, like the English House of Commons, a popular pet, the other never, like the English House of Lords, a popular bugbear.

What is perhaps stranger, the two branches of Congress have not exhibited that contrast of feeling and policy which might be expected from the different methods by which they are chosen. In the House the large States are predominant: nine out of thirty-eight (less than one-fourth) return an absolute majority of the 325 representatives. In the Senate these same nine States have only eighteen members out of seventy-six, less than a fourth of the whole. In other words, these nine States are more than sixteen times as powerful in the House as they are in the Senate. But as the House has never been the organ of the large States, nor prone to act in their interest, so neither has the Senate been the stronghold of the small States, for American politics have never turned upon an antagonism between these two sets of commonwealths. Questions relating to States' rights and the greater or less extension of the

powers of the national government have played a leading part in the history of the Union. But although small States might be supposed to be specially zealous for States' rights, the tendency to uphold them has been no stronger in the Senate than in the House. In one phase of the slavery struggle the Senate happened to be under the control of the slaveholders while the House was not; and then of course the Senate championed the sovereignty of the States. But this attitude was purely accidental, and disappeared with its transitory cause.

The real differences between the two bodies have been indicated in speaking of the Senate. They are due to the smaller size of the latter, to the somewhat superior capacity of its members, to the habits which its executive functions form in individual senators, and have formed in the whole body.

In Europe, where the question as to the utility of second chambers is actively canvassed, two objections are made to them, one that they deplete the first or popular chamber of able men, the other that they induce deadlocks and consequent stoppage of the wheels of government. On both arguments light may be expected from American experience.

Although the Senate does draw off from the House many of its ablest men, it is not clear, paradoxical as the observation may appear, that the House would be much the better for retaining those men. The faults of the House are mainly due, not to want of talent among individuals, but to its defective methods, and especially to the absence of leadership. These are faults which the addition of twenty or thirty able men would not cure. Some of the committees would be stronger, and so far the work would be better done. But the House as a whole would not (assuming

its rules and usages to remain what they are now) be distinctly a greater power in the country. On the other hand, the merits of the Senate are largely due to the fact that it trains to higher efficiency the ability which it has drawn from the House, and gives that ability a sphere in which it can develop with better results. Were the Senate and the House thrown into one, the country would lose more, I think much more, by losing the Senate than it would gain by improving the House, for the united body would have the qualities of the House and not those of the Senate.

Collisions between the two Houses are frequent. Each is jealous and combative. Each is prone to alter the bills that come from the other; and the Senate in particular knocks about remorselessly those favourite children of the House, the appropriation bills. The fact that one House has passed a bill goes but a little way in inducing the other to pass it; the Senate would reject twenty House bills as readily as one. Deadlocks, however, disagreements over serious issues which stop the machinery of administration, are not common. They rarely cause excitement or alarm outside Washington, because the country, remembering previous instances, feels sure they will be adjusted, and knows that either House would yield were it unmistakably condemned by public opinion. The executive government goes on undisturbed, and the worst that can happen is the loss of a bill which may be passed four months later. Even as between the two bodies there is no great bitterness in these conflicts, because the causes of quarrel do not lie deep. Sometimes it is self-esteem that is involved, the sensitive self-esteem of an assembly. Sometimes one or other House is playing for a party advantage. That intensity which

in the similar contests of Europe arises from class feeling is absent, because there is no class distinction between the two American chambers. Thus the country seems to be watching a fencing match rather than a *combat à outrance.*

I dwell upon this substantial identity of character in the Senate and the House because it explains the fact, surprising to a European, that two perfectly co-ordinate authorities, neither of which has any more right than its rival to claim to speak for the whole nation, manage to get along together. Their quarrels are professional and personal rather than conflicts of adverse principles. The two bodies are not hostile elements in the nation, striving for supremacy, but servants of the same master, whose word of rebuke will quieten them.

It must, however, be also remembered that in such countries as England, France, and Italy, the popular chamber stands in very close relation with the executive government, which it has virtually installed and which it supports. A conflict between the two chambers in such countries is therefore a conflict to which the executive is a party, involving issues which may be of the extremest urgency; and this naturally intensifies the struggle. For the House of Lords in England or the Senate in Italy to resist a demand for legislation made by the ministry, who are responsible for the defence and peace of the country, and backed by the representative House, is a more serious matter than almost any collision between the Senate and the House can be in America.[1]

[1] Of course a case may be imagined in which the President should ask for legislation, as Lincoln did during the war, and one House of Congress should grant, the other refuse, the Acts demanded. But such

The United States is the only great country in the world in which the two Houses are really equal and co-ordinate. Such a system could hardly work, and therefore could not last, if the executive were the creature of either or of both, nor unless both were in close touch with the sovereign people.

When each chamber persists in its own view, the regular proceeding is to appoint a committee of conference, consisting of three members of the Senate and three of the House. These six meet in secret, and generally settle matters by a compromise, which enables each side to retire with honour. When appropriations are involved, a sum intermediate between the smaller one which the House proposes to grant and the larger one desired by the Senate is adopted. If no compromise can be arranged, the conflict continues till one side yields or it ends by an adjournment, which of course involves the failure of the measure disagreed upon. The House at one time tried to coerce the Senate into submission by adding "riders," as they are called, to appropriation bills, *i.e.* annexing or "tacking" (to use the English expression) pieces of general legislation to bills granting sums of money. This puts the Senate in the dilemma of either accepting the unwelcome rider, or rejecting the whole bill, and thereby withholding from the executive the funds it needs. This happened in 1855 and 1856. However, the Senate stood firm, and the House gave way. The device had previously been attempted (in 1849) by the Senate in tacking a pro-slavery provision to an appropriation bill which it was returning to the House, and it was revived by both Houses against President Andrew Johnson in 1867.

cases are less likely to occur in America than in Europe under the Cabinet system.

In a contest the Senate usually, though not invariably, gets the better of the House. It is smaller, and can therefore more easily keep its majority together; its members are more experienced; and it has the great advantage of being permanent, whereas the House is a transient body. The Senate can hold out, because if it does not get its way at once against the House, it may do so when a new House comes up to Washington. The House cannot afford to wait, because the hour of its own dissolution is at hand. Besides, while the House does not know the Senate from inside, the Senate, many of whose members have sat in the House, knows all the "ins and outs" of its rival, can gauge its strength and play upon its weakness.

CHAPTER XIX

GENERAL OBSERVATIONS ON CONGRESS

AFTER this inquiry into the composition and working of each branch of Congress, it remains for me to make some observations which apply to both Houses, and which may tend to indicate the features that distinguish them from the representative assemblies of Europe. The English reader must bear in mind three points which, in following the details of the last few chapters, he may have forgotten. The first is that Congress is not like the Parliaments of England, France, and Italy, a sovereign assembly, but is subject to the Constitution, which only the people can change. The second is, that it neither appoints nor dismisses the executive government, which springs directly from popular election. The third is, that its sphere of legislative action is limited by the existence of thirty-eight governments in the several States, whose authority is just as well based as its own, and cannot be curtailed by it.

I. The choice of members of Congress is locally limited by law and by custom. Under the Constitution every representative and every senator must when elected be an inhabitant of the State whence he is elected. Moreover, State law has in many and custom practically in all States, established that a representative

must be resident in the congressional district which elects him.[1] The only exceptions to this practice occur in large cities where occasionally a man is chosen who lives in a different district of the city from that which returns him; but such exceptions are extremely rare. This restriction surprises a European, who thinks it must be found highly inconvenient both to candidates, as restricting their field of choice in looking for a constituency, and to constituencies, as excluding persons, however eminent, who do not reside in their midst. To Americans, however, it seems so obviously reasonable that I found very few persons, even in the best educated classes, who would admit its policy to be disputable. In what are we to seek the causes of this opinion?

Firstly. In the existence of States, originally separate political communities, still for many purposes independent, and accustomed to consider the inhabitant of another State as almost a foreigner. A New Yorker, Pennsylvanians would say, owes allegiance to New York; he cannot feel and think as a citizen of Pennsylvania, and cannot therefore properly represent Pennsylvanian interests. This sentiment has spread by a sort of sympathy, this reasoning has been applied by a sort of analogy, to the counties, the cities, the electoral districts of the State itself. State feeling has fostered local feeling; the locality deems no man a fit representative who has not by residence in its limits, and by making it his political home, the place where he exercises his civic rights, become soaked with its own local sentiment.

[1] The best legal authorities hold that a provision of this kind is invalid, because State law has no power to narrow the qualifications for a Federal representative prescribed by the Constitution of the United States. And Congress would probably so hold if the question arose in a case brought before it as to a disputed election. So far as I have been able to ascertain, the point has never arisen for determination.

Secondly. Much of the interest felt in the proceedings of Congress relates to the raising and spending of money. Changes in the tariff may affect the industries of a locality; or a locality may petition for an appropriation of public funds to some local public work, the making of a harbour, or the improvement of the navigation of a river. In both cases it is thought that no one but an inhabitant can duly comprehend the needs or zealously advocate the demands of a neighbourhood.

Thirdly. Inasmuch as no high qualities of statesmanship are expected from a congressman, a district would think it a slur to be told that it ought to look beyond its own borders for a representative; and as the post is a paid one, the people feel that a good thing ought to be kept for one of themselves rather than thrown away on a stranger. It is by local political work, organizing, canvassing, and haranguing, that a party is kept going: and this work must be rewarded.

A perusal of the chapter of the *Federalist*, which argues that one representative for 30,000 inhabitants will sufficiently satisfy republican needs, suggests another reflection. The writer refers to some who held a numerous representation to be a democratic institution, because it enabled every small district to make its voice heard in the national Congress. Such representation then existed in the State legislatures. Evidently the habits of the people were formed by these State legislatures, in which it was a matter of course that the people of each township or city sent one of themselves to the assembly of the State. When they came to return members to Congress, they followed the same practice. A stranger had no means of making himself known to them and would not think of offering himself. That the habits of England are

different may be due, so far as the eighteenth century is concerned, to the practice of borough-mongering, under which candidates unconnected with the place were sent down by some influential person, or bought the seat from the corrupt corporation or the limited body of freemen. Thus the notion that a stranger might do well enough for a borough grew up, while in counties it remained, till 1885, a maxim that a candidate ought to own land in the county[1]—the old law required a freehold qualification somewhere—or ought to live in, or ought at the very least (as I once heard a candidate, whose house lay just outside the county for which he was standing, allege on his own behalf) to look into the county from his window while shaving in the morning.[2] The English practice might thus seem to be

[1] The old law (9 Anne, c. 5) required all members to possess a freehold qualification somewhere. All property qualifications were abolished by statute in 1858.

[2] The English habit of allowing a man to stand for a place with which he is personally unconnected would doubtless be favoured by the fact that many ministers are necessarily members of the House of Commons. The inconvenience of excluding a man from the service of the nation because he could not secure his return in the place of his residence would be unendurable. No such reason exists in America, because ministers cannot be members of Congress. In France, Germany, and Italy the practice seems to resemble that of England, *i.e.* many members sit for places where they do not reside, though of course a candidate residing in the place he stands for has a certain advantage.

It is remarkable that the original English practice required the member to be a resident of the county or borough which returned him to Parliament. This is said to be a requirement at common law (witness the words "de comitatu tuo" in the writ for the election addressed to the sheriff); and was expressly enacted by the statute 1 Henry V. cap. 1. But already in the time of Elizabeth the requirement was not enforced; and in 1681 Lord Chief-Justice Pemberton ruled that "little regard was to be had to that ancient statute 1 Henry V. forasmuch as common practice hath been ever since to the contrary." The statute was repealed by 14 Geo. III. cap. 50.—See Anson, *Law and Custom of the Constitution*, vol. i. p. 83; Stubbs, *Constit. Hist.*, vol. iii. p. 424. Dr. Stubbs observes that the object of requiring residence in early times was to secure "that the House of Commons should be a really representative body." Mr. Hearn (*Government of England*) suggests that

an exception due to special causes, and the American practice that which is natural to a free country, where local self-government is fully developed and rooted in the habits of the people. It is from their local government that the political ideas of the American people have been formed: and they have applied to their State assemblies and their national assembly the customs which grew up in the smaller area.[1]

These are the best explanations I can give of a phenomenon which strikes Europeans all the more because it exists among a population more unsettled and migratory than any in the Old World. But they leave me still surprised at this strength of local feeling, a feeling not less marked in the new regions of the Far West than in the venerable commonwealths of Massachusetts and Virginia. The most significant fact about the practice in America is that one seldom hears it there commented on as a defect of the political system. Fierce as is the light of criticism which beats upon every part of that system, this point, which at once strikes the European as specially weak, remains uncensured, because assumed to be part of the order of nature.

Its results are unfortunate. So far as the restriction

the requirement had to be dropped because it was hard to find country gentlemen (or indeed burgesses) possessing the legal knowledge and statesmanship which the constitutional struggles of the sixteenth and seventeenth centuries demanded.

[1] When President Garfield was one of the leaders of the House of Representatives it happened that his return for the district in which he resided became doubtful, owing to the strength of the Democratic party there. One of his friends (to whom I owe the anecdote), anxious to make sure that he should somehow be returned to the House, went into the adjoining district to sound the Republican voters there as to the propriety of running Mr. Garfield for their constituency. They laughed at the notion, "Why, he don't live in our deestrict." I have heard of a case in which a member of Congress having after his election gone to live in a neighbouring district, was thereupon compelled by the pressure of public opinion to resign his seat.

to residents in a State is concerned it is intelligible. The senator was—to some extent is still—a sort of ambassador from his State. He is chosen by the legislature or collective authority of his State. He cannot well be a citizen of one State and represent another. Even a representative in the House from one State who lived in another might be perplexed by a divided allegiance, though there are groups of States, such as those of the north-west, whose great industrial interests are substantially the same. But what reason can there be for preventing a man resident in one part of a State from representing another part, a Philadelphian, for instance, from being returned for Pittsburg, or a Bostonian for Lenox in the west of Massachusetts? In England it is not found that a member is less active or successful in urging the local interests of his constituency because he does not live there. He is often more successful, because more personally influential or persuasive than any resident whom the constituency could supply; and in case of a conflict of interests he always feels his efforts to be owing first to his constituents, and not to the place in which he happens to reside.

The mischief is twofold. Inferior men are returned, because there are many parts of the country which do not grow statesmen, where nobody, or at any rate nobody desiring to enter Congress, is to be found above a moderate level of political capacity. And men of marked ability and zeal are prevented from forcing their way in. Such men are produced chiefly in the great cities of the older States. There is not room enough there for nearly all of them, but no other doors to Congress are open. Boston, New York, Philadelphia, Baltimore, could furnish six or eight times as many good members as there are seats in these cities. As

such men cannot enter from their place of residence, they do not enter at all, and the nation is deprived of the benefit of their services. Careers are moreover interrupted. A promising politician may lose his seat in his own district through some fluctuation of opinion, or perhaps because he has offended the local wire-pullers by too much independence. Since he cannot find a seat elsewhere, as would happen in England, he is stranded; his political life is closed, while other young men inclined to independence take warning from his fate. Changes in the State laws would not remove the evil, for the habit of choosing none but local men is rooted so deeply that it would probably long survive the abolition of a restrictive law, and it is just as strong in States where no such law exists.[1]

II. Every senator and representative receives a salary at present fixed at $5000 (£1000) per annum, besides an allowance (called mileage) of 20 cents (10d.) per mile for travelling expenses to and from Washington, and $125 (£25) for stationery. The salary is looked upon as a matter of course. It was not introduced for the sake of enabling working men to be returned as members, but on the general theory that all public work ought to be paid for.[2] The reasons for it are stronger than in England or France, because the distance to Washington from most parts of the United States is so great, and the attendance required there so continuous, that a man cannot attend to his profession or business while sitting in Congress. If he loses his livelihood in serving the community, the

[1] In Maryland, a State almost divided into two parts by Chesapeake Bay, it is the invariable practice that one of the two senators should be chosen from the residents east of the bay, the other from those of the western shore.

[2] Benjamin Franklin argued strongly in the Convention of 1787 against this theory, but found little support. See his remarkable speech in Mr. John Bigelow's *Life of Franklin*, vol. iii. p. 389.

community ought to compensate him, not to add that the class of persons whose private means put them above the need of a lucrative calling, or of compensation for interrupting it, is comparatively small even now, and hardly existed when the Constitution was framed. Cynics defend the payment of congressmen on another ground, viz. that "they would steal worse if they didn't get it," and would make politics, as Napoleon made war, support itself. Be the thing bad or good, it is at any rate necessary, so that no one talks of abolishing it. For that reason its existence furnishes no argument for its introduction into a small country with a large leisured and wealthy class. In fact, the conditions of European countries are so different from those of America that one must not cite American experience either for or against the remuneration of legislative work. I do not believe that the practice works ill by preventing good men from entering politics, for they feel no more delicacy in accepting their $5000 than an English duke does in drawing his salary as a secretary of state. It may strengthen the tendency of members to regard themselves as mere delegates, but that tendency has other and deeper roots. It contributes to keep up a class of professional politicians, for the salary, though small in comparison with the incomes earned by successful merchants or lawyers, is a prize to men of the class whence professional politicians mostly come. But those English writers who describe it as the formative cause of that class are mistaken. That class would have existed had members not been paid, would continue to exist if payment were withdrawn. On the other hand, the benefit which the English advocates of paid legislators dilate on, viz. the introduction of a large number of representative working men, has hitherto been little desired and nowise secured. Few such

persons appear as candidates in America, and until recently the working class has not deemed itself, nor acted as, a distinct body with special interests.[1]

In 1873 Congress passed an act increasing many official salaries, and among others those of senators and representatives, which it raised from $5000 to $7500 (£1500). All the increases were to take effect for the future only, except that of congressional salaries, which was made retroactive. This unblushing appropriation by Congress of nearly $200,000 to themselves roused so much indignation that the act, except with relation to the salaries of Federal judges, was repealed by the next Congress. It is known as the "back-pay grab."

III. A congressman's tenure of his place is usually short. Senators are sometimes returned for two, three, or even four successive terms by the legislatures of their States, although it may befall even the best of them to be thrown out by a change in the balance of parties, or by the intrigues of an opponent. But a member of the House can seldom feel safe in the saddle. If he is so eminent as to be necessary to his party, or if he maintains intimate relations with the leading local wire-pullers of his district, he may in the eastern, middle, and southern States hold his ground for three or four Congresses, *i.e.* for six or eight years. Very few do more than this. In the West a member is extremely lucky if he does even this. Out there a seat is regarded as a good thing which ought to go round.

[1] In Victoria (Australia) members of the popular house receive a salary of £300 a year. I understand that this has had so far no considerable effect in enabling working men to enter the assembly. In Australia, however, a representative seems to be expected to subscribe to local objects within his constituency, which is not the case in America, and is every day less the case in England. In France and Germany representatives are paid. In Italy they receive no salary, but a free pass over the railroads.

It has a salary. It sends a man, free of expense, for two winters and springs to Washington and lets him see something of the fine world there, where he rubs shoulders with ambassadors from Europe. Local leaders cast sheep's eyes at the seat, and make more or less open bargains between themselves as to the order in which they shall enjoy it. So far from its being, as in England, a reason for re-electing a man that he has been a member already, it is a reason for passing him by, and giving somebody else a turn. Rotation in office, dear to the Democrats of Jefferson's school a century ago, still charms the less educated, who see in it a recognition of equality, and have no sense of the value of special knowledge or training. They like it for the same reason that the democrats of Athens liked the choice of magistrates by lot. It is a recognition and application of equality. An ambitious congressman is therefore forced to think day and night of his renomination, and to secure it not only by procuring, if he can, grants from the Federal treasury for local purposes, and places for the relatives and friends of the local wire-pullers who control the nominating conventions, but also by sedulously "nursing" the constituency during the vacations. No habit could more effectually discourage noble ambition or check the growth of a class of accomplished statesmen. There are few walks of life in which experience counts for more than it does in parliamentary politics. It is an education in itself, an education in which the quick-witted western American would make rapid progress were he suffered to remain long enough at Washington. At present he is not suffered, for, as observed above, nearly one-half of each successive house consists of new men, while the old members are too much harassed by the trouble of procuring their

re-election to have time or motive for the serious study of political problems. This is what comes of the doctrine that a member ought to be absolutely dependent on his constituents, and of the notion that politics is neither a science, nor an art, nor even an occupation, like farming or store-keeping, in which one learns by experience, but a thing which comes by nature, and for which one man of common sense is as fit as another.

IV. The last-mentioned evil is aggravated by the short duration of a Congress. Short as it seems, the two years term was warmly opposed, when the Constitution was framed, as being too long.[1] The constitutions of the several States, framed when they shook off the supremacy of the British Crown, all fixed one year, except the ultra-democratic Connecticut and Rhode Island, where under the colonial charters a legislature met every six months, and South Carolina, which had fixed two years. So essential to republicanism was this principle deemed, that the maxim "where annual elections end tyranny begins" had passed into a proverb;[2] and the authors of the *Federalist* were obliged to argue that the limited authority of Congress, watched by the executive on one side, and the State legislatures on the other, would prevent so long a period as two years from proving dangerous to liberty, while it was needed in order to enable the members to master the laws and understand

[1] In the Massachusetts Convention of 1788, when this question was being discussed, "General Thomson then broke out into the following pathetic apostrophe, 'O my country, never give up your annual elections: young men, never give up your jewel.' He apologized for his zeal."—Elliot's *Debates*, vol. ii. p. 16.

[2] The whole subject is discussed with acuteness and judgment in the 51st and 52d numbers of the *Federalist*, numbers whose authorship is variously attributed to Hamilton and to Madison. In England the duration of parliaments was at one time (and may perhaps be again) matter of active controversy. One of the five points of the "People's Charter" of 1848 was the restriction of their duration to one year.

the conditions of different parts of the Union. At present the two years term is justified on the ground that it furnishes a proper check on the President. The Congress elected in the autumn of 1884 at the same time as the President, meets in December 1885, while another, elected in 1886, meets in 1887, and thus covers the later part of his four years term. Thus the people can, if they please, express disapproval of the policy which he has so far followed. One is also told that these frequent elections are necessary to keep up popular interest in current politics, nor do some fail to hint that the temptations to jobbing would overcome the virtue of members who had a longer term before them. Where American opinion is unanimous, it would be presumptuous for a stranger to dissent. Yet the remark may be permitted that the dangers originally feared have proved chimerical. There is no country whose representatives are more dependent on popular opinion, more ready to trim their sails to the least breath of it. The public acts, the votes, and speeches of a member from Oregon or Texas can be more closely watched by his constituents than those of a Virginian member could be watched in 1789.[1] And as the frequency of elections involves inexperienced members, the efficiency of Congress suffers.

V. The numbers of the two American houses seem small to a European when compared on the one hand with the population of the country, on the other with the practice of European States. The Senate has 76 members against the British House of Lords with about 560, and the French Senate with 300. The House has 325 against the British House of Commons with

[1] Of course his conduct in committee is rarely known, but I doubt whether the shortness of the term makes him more scrupulous.

670, and the French and Italian Chambers with 584 and 508 respectively.

The Americans, however, doubt whether both their Houses have not already become too large. They began with 26 in the Senate, 65 in the House, numbers then censured as too small, but which worked well, and gave less encouragement to idle talk and vain display than the crowded halls of to-day. The proportion of representatives to inhabitants, originally 1 to 30,000, is now 1 to 154,000, having constantly fallen as the population increased. The inclination of wise men is to stop further increase when the number of 400 has been reached, for they perceive that the House already suffers from disorganization, and fear that a much larger one would prove unmanageable.[1] So much depends on the

[1] There is force in the following observations which I copy from the 54th and 57th numbers of the *Federalist*:—"A certain number at least seems necessary to secure the benefits of free consultation and discussion, and to guard against too easy a combination for improper purposes; as on the other hand, the number ought to be kept within a certain limit in order to avoid the confusion and intemperance of a multitude. In all very numerous assemblies, of whatever characters composed, passion never fails to wrest the sceptre from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob. . . . In all legislative assemblies, the greater the number comprising them may be, the fewer will be the men who will in fact direct their proceedings. The larger the number, the greater will be the proportion of members of limited information and of weak capacities. Now it is precisely on characters of this description that the eloquence and address of the few are known to act with all their force. In the ancient republics where the whole body of the people assembled in person, a single orator, or an artful statesman, was generally seen to rule with as complete a sway as if a sceptre had been placed in his single hand. On the same principle the more multitudinous a representative assembly may be rendered, the more it will partake of the infirmities incident to collective meetings of the people. Ignorance will be the dupe of cunning, and passion the slave of sophistry and declamation. The people can never err more than in supposing that by multiplying their representatives beyond a certain limit they strengthen the barrier against the government of a few. Experience will for ever admonish them that, on the contrary, *after securing a certain number for the purposes of safety, of local information, and of diffusing sympathy with the whole society*, they will counteract their own views by every addition to their representatives."

particular circumstances of each country that no general rule can be laid down as to the size of representative assemblies, and the experience of one nation is of no great value for another. So far as general principles go, a student of politics will be disposed to think that as the American Chamber ought not to be raised much further, so the British House of Commons ought to be rather reduced than increased.[1]

VI. American congressmen are more assiduous in their attendance than the members of most European legislatures. The great majority not only remain steadily at Washington through the session, but are usually to be found in the Capitol, often in their Chamber itself, while a sitting lasts. There is therefore comparatively little trouble in making a quorum,[2] though the quorum consists of one half in each House, whereas in England the House of Lords, whose quorum is three, has usually less than thirty peers present, and the House of Commons finds a difficulty, through many private members' days and on government days from eight till ten o'clock p.m., in making up its modest quorum of forty.[3] This requirement of a high quorum, which is prescribed in the Constitution, has doubtless helped to secure a good attendance. Other causes are the distance from Washington of the residences of most members, so that it is not worth while to take the journey home for a short sojourn,

[1] The House of Commons would be much less manageable than it is did the whole of its 670 members attend. Even now, the number present during a debate rarely exceeds 450, though of course as many as 600 sometimes vote in great divisions. There is sitting space on the floor for only 360.

[2] Though sometimes the sergeant-at-arms is sent round Washington with a carriage to fetch members down from their residences to the Capitol.

[3] Oliver Cromwell's House of 360 members, including 30 from Scotland and 30 from Ireland, had a quorum of 60. See the Articles of December 1653 in *Parliamentary History*, vol. iii. p. 1417.

and the fact that very few attempt to carry on any regular business or profession while the session lasts. Those who are lawyers, or merchants, or manufacturers, leave their work to partners; but many are politicians and nothing else. In Washington, a city without commerce or manufactures, political or semi-political intrigue is the only gainful occupation possible; for the Supreme Court practice employs only a few leading barristers. The more democratic a country is, so much the more regular is the attendance, so much closer the attention to the requests of constituents which a member is expected to render. Every extension of the suffrage in England has been followed not only by a change in the character of the House of Commons, but by an increase in the numbers usually present, and in the eagerness of members to defer to every wish of those who have returned them.[1] Apart from that painful duty of finding places for constituents which consumes so much of a congressman's time, his duties are not heavier than those of a member of the English Parliament who desires to keep abreast of current questions. The sittings are neither so long nor so late as those of the House of Commons; the questions that come up not so multifarious, the blue books to be read less numerous, the correspondence (except about places) less troublesome. The position of senator is more onerous than that of a member of the House, not only because his whole State, and not merely a district, has a direct claim upon him, but also because, as one of a smaller

[1] Before the Reform Bill of 1832 there were rarely more than 200 members present in the House of Commons, and it usually sat for two or three hours only in each day. I remember to have been told of a member for Hampshire about 1820, who sat for thirteen years, being in perfect health, and was only thrice in the House. Nor was this deemed a very singular case.

body, he incurs a larger individual responsibility, and sits upon two or more committees instead of on one only.

VII. The reasons which make a political career unattractive to most Americans will deserve to be considered in a later chapter. Here I will only remark that the want of opportunities for distinction in Congress is one of them. It takes a new member at least a session to learn the procedure of the House. Full dress debates are rare, newspaper reports of speeches delivered are curt and little read. The most serious work is done in committees; it is not known to the world, and much of it results in nothing, because many bills which a committee has considered are perhaps never even voted on by the House. A place on a good House committee is to be obtained by favour, and a high-spirited man may shrink from applying for it to the Speaker. Ability, tact, and industry make their way in the long run in Congress, as they do everywhere else. But in Congress there is, for most men, no long run. Only very strong local influence, or some remarkable party service rendered, will enable a member to keep his seat through two or three successive congresses. Nowhere therefore does the zeal of a young politician sooner wax cold than in the House of Representatives. Unfruitful toil, the toil of turning a crank which does nothing but register its own turnings, or of writing contributions which an editor steadily rejects, is of all things the most disheartening. It is more disheartening than the non-requital of merit; for that at least spares the self-respect of the sufferer. Now toil for the public is usually unfruitful in the House of Representatives, indeed in all Houses. But toil for the pecuniary interests of one's constituents and friends is fruitful, for it obliges people, it wins the reputation of energy and

smartness, it has the promise not only of a re-nomination, but of a possible seat in the Senate. Now a seat in the Senate is the highest ambition of the congressman. Power, fame, perhaps even riches, sit upon that pinnacle. But the thin spun life is usually slit before the fair guerdon has been found. When I first went to America, I used to ask the ablest and most ambitious of the friends I made among young men whether they looked forward to entering Congress. Out of many scarcely one seemed drawn towards the career which those who have won success at the universities of England naturally look forward to.[1] Presently I came to understand their attitude, and to feel that the probable disappointments and vexations of a life in Congress so far outweighed its attractions that nothing but a strong sense of public duty would induce a man of fine tastes and high talents to adopt it. Law, education, literature, the higher walks of commerce, finance, or railway work, offer a better prospect of usefulness, enjoyment, or distinction.

Inside Washington, the representative is dwarfed by the senator and the Federal judges. Outside Washington he enjoys no great social consideration.[2] His opinion is not quoted with respect. He seems to move about under a *prima facie* suspicion of being a jobber, and to feel that the burden of proof lies on him to show that

[1] Although young Englishmen seem less drawn to parliamentary life now than they were twenty or thirty years ago.

[2] A few years ago an eminent Englishman, not then a member of the House of Commons, visiting one of the colleges for women in New England, and wishing to know something of the social standing of the students, remarked, "I suppose you have a good many young ladies here belonging to the best families, daughters of members of Congress and so forth?" The question excited so much amusement that it was repeated to me months afterwards not only as an instance of English ignorance but as an excellent joke.

the current jests on this topic do not apply to him. Rich men therefore do not seek, as in England, to enter the legislature in order that they may enter society. They will get no *entrée* which they could not have secured otherwise. Nor is there any opportunity for the exercise of those social influences which tell upon members, and still more upon members' wives and daughters, in European legislatures. It may of course be worth while to "capture" a particular senator, and for that purpose to begin by capturing his wife. But the *salon* plays no sensible part in American public life.

The country does not go to Congress to look for its presidential candidates as England looks to Parliament for its prime ministers. The opportunities by which a man can win distinction there are few. He does not make himself familiar to the eye and ear of the people. Congress, in short, is not a focus of political life as are the legislatures of France, Italy, and England. This has always been so, and is no less so now than formerly. Although Congress has become more powerful against the several States than it was formerly, though it has extended its arms in every direction, and encroached upon the executive, it has not become more interesting to the people, it has not strengthened its hold on their respect and affection.

VIII. Neither in the Senate nor in the House are there any recognized leaders. There is no ministry, no ex-ministry leading an opposition, no chieftains at the head of definite groups who follow their lead, as the Irish Nationalist members in the British Parliament follow Mr. Parnell, and a large section of the Left in the French chamber follow M. Clemenceau. In other words, no regular means exist for securing either that members shall be apprised of the approach of an important

division, or that they shall vote in that division in a particular way.

To any one familiar with the methods of the English parliament this seems incomprehensible. How, he asks, can business go on at all, how can the party make itself felt as a party with neither leader nor Whips?

I have mentioned the Whips. Let me say a word on this vital, yet even in England little appreciated, part of the machinery of constitutional government. Each party in the House of Commons has, besides its leaders, a member of the House nominated by the chief leader as his aide-de-camp, and called the whipper-in, or, for shortness, the whip. The whip's duties are (1) to inform every member belonging to the party when an important division may be expected, and if he sees the member in or about the House, to keep him there until the division is called; (2) to direct the members of his own party how to vote; (3) to obtain pairs for them if they cannot be present to vote; (4) to "tell," *i.e.* count the members in every party division; (5) to "keep touch" of opinion within the party, and convey to the leader a faithful impression of that opinion, from which the latter can judge how far he may count on the support of his whole party in any course he proposes to take. A member in doubt how he shall vote on a question with regard to which he has no opinion of his own, goes to the whip for counsel. A member who without grave cause stays away unpaired from an important division to which the whip has duly summoned him is guilty of a misdemeanour only less flagrant than that of voting against his party. A ministerial whip is further bound to "keep a house," *i.e.* to secure that when government business is being considered there shall always be a quorum of members present, and of course also to keep a majority,

i.e. to have within reach a number of supporters sufficient to give the ministry a majority on any ministerial division.[1] Without the constant presence and activity of the ministerial whip the wheels of government could not go on for a day, because the ministry would be exposed to the risk of casual defeats which would destroy their credit and might involve their resignation. Similarly the Opposition, and any third or fourth party, find it necessary to have a whip, because it is only thus that they can act as a party, guide their supporters, and bring their full strength to bear on a division. Hence when a new party is formed, its first act, that by which it realizes and proclaims its existence, is to name a whip, to whom its adherents may go for counsel, and who may in turn receive their suggestions as to the proper strategy for the party to adopt.[2] So essential are these officers to the discipline of English parliamentary armies that an English politician's first question when he sees Congress is, "Where are the whips?" his next, "How in the world do you get on without them?"

The answer to this question is threefold. Whips are not so necessary at Washington as at Westminster. A

[1] That which was at one time the chief function of the ministerial whip, viz. to pay members for the votes they gave in support of the government, has been extinct for about a century. He is still, however, the recognized organ for handling questions of political patronage, and is therefore called the Patronage Secretary to the Treasury. People who want places for their friends, or titles for themselves, still address their requests to him, which he communicates to the prime minister with his opinion as to whether the applicant's party services justify the request. Nowadays this patronage has no great political importance.

[2] Even parties formed with a view to particular, and probably transitory issues, such as that of the English Anti-Home-Rule Liberals in the House of Commons at this moment (1888), appoint one or more of their members as whips, because they could not otherwise act with that effect which only habitual concert gives. Each party has its whips in the House of Lords also, but as divisions there have less political significance their functions are less important.

sort of substitute for them has been devised. Congress does suffer from the want of them, that is, it suffers from the inadequacy of the substituted device.

A division in Congress has not the importance it has in the House of Commons. There it may throw out the ministry. In Congress it never does more than affirm or negative some particular bill or resolution. Even a division in the Senate which involves the rejection of a treaty or of an appointment to some great office, does not disturb the tenure of the executive. Hence it is not essential to the majority that its full strength should be always at hand, nor has a minority party any great prize set before it as the result of a successful vote.

Questions, however, arise in which some large party interest is involved. There may be a bill by which the party means to carry out its main views of policy or perhaps to curry favour with the people, or a resolution whereby it hopes to damage a hostile executive. In such cases it is important to bring up every vote. Accordingly a meeting of the party is convened, called a senatorial caucus or congressional (*i.e.* House) caucus (as the case may be).[1] The attitude to be assumed by the party is debated with closed doors, and a vote taken as to the course to be adopted. By this vote every member of the party is deemed bound, just as he would be in England by the request of the leader conveyed through the whip. Disobedience cannot be punished in Congress itself, except of course by social penalties; but it endangers the seat of the too independent mem-

[1] At the beginning of a session each party in the Senate and in the House elects a chairman of the party caucus; and it is the duty of this person to convoke a caucus of his party when the need arises. An experienced senator told me that the Senate caucus of his party used to meet on an average twice a month, the House caucus less frequently. General meetings of a party in Parliament are much less common in England.

ber, for the party managers at Washington will communicate with the party managers in his district, and the latter will probably refuse to re-nominate him at the next election. The most important caucus of a Congress is that held at the opening to select the party candidate for the speakership, selection by the majority being of course equivalent to election. As the views and tendencies of the Speaker determine the composition of the committees, and thereby the course of legislation, his selection is a matter of supreme importance, and is preceded by weeks of intrigue and canvassing.

This process of "going into caucus" is the regular American substitute for recognized leadership, and has the advantage of seeming more consistent with democratic equality, because every member of the party has in theory equal weight in the party meeting. It is used whenever a line of policy has to be settled, or the whole party to be rallied for a particular party division. But of course it cannot be employed every day or for every bill. Hence when no party meeting has issued its orders, a member is free to vote as he pleases, or rather as he thinks his constituents please. If he knows nothing of the matter, he may take a friend's advice, or vote as he hears some prominent man on his own side vote. Anyhow, his vote is doubtful, unpredictable; and consequently divisions on minor questions are uncertain. This is a further reason, added to the power of the standing committees, why there is a want of consistent policy in the action of Congress. As its leading men have comparatively little authority, and there are no means whereby a leader could keep his party together on ordinary questions, so no definite ideas run through its conduct and express themselves in its votes. It moves in zig-zags.

The freedom thus enjoyed by members on minor questions has the interesting result of preventing dissensions and splits in the parties. There are substances which cohere best when their contact is loose. Fresh fallen snow keeps a smooth surface even on a steep slope, but when by melting and regelation it has become ice, cracks and rifts begin to appear. A loose hung carriage will hold together over a road whose roughness would strain and break a more solid one. Hence serious differences of opinion may exist in a congressional party without breaking its party unity, for nothing more is needed than that a solid front should be presented on the occasions, few in each session, when a momentous division arrives. The appearance of agreement is all the more readily preserved because there is little serious debating, so that the advocates of one view seldom provoke the other section of their party to rise and contradict them; while a member who dissents from the bulk of his party on an important issue is slow to vote against it, because he has little chance of defining and defending his position by an explanatory speech.

The congressional caucus is more or less called into action according to the number and gravity of the party issues that come before Congress. In troublous times it has to be supplemented by something like obedience to regular leaders. Mr. Thaddeus Stevens, for instance, led with recognized authority the majority of the House in its struggle with President Andrew Johnson. The Senate is rather more jealous of the equality of all its members. No senator can be said to have any authority beyond that of exceptional talent and experience; and of course a senatorial caucus, since it rarely consists of more than forty persons, is a better

working body, than a House caucus, which may reach two hundred.[1]

The European reader may be perplexed by the apparent contradictions in what has been said regarding the party organization of Congress. "Is the American House after all," he will ask, "more or less a party body than the British House of Commons? Is the spirit of party more or less strong in Congress than in the American people generally?"

I answer firstly that the House of Representatives is for the purpose of serious party issues fully as much a party body as the House of Commons. A member voting against his party on such an issue is more certain to forfeit his party reputation and his seat than is an English member. This is true of both the Senate and the House. But for the purpose of ordinary questions, of issues not involving party fortunes, a representative is less bound by party ties than an English member, because he has neither leaders to guide him by their speeches nor whips by their private instructions. The apparent gain is that a wider field is left for independent judgment on non-partisan questions. The real loss is that legislation becomes weak and inconsistent. This conclusion is not encouraging to those who expect us to get rid of party in our legislatures. A deliberative assembly is, after all, only a crowd of men; and the more intelligent a crowd is, so much the more numerous are its volitions; so much greater the difficulty of

[1] At one time the congressional caucus played in American history a great part which it has now renounced. From 1800 till 1824 party meetings of senators and representatives were held which nominated the party candidates for the presidency, who were then accepted by each party as its regular candidates. In 1828 the State legislatures made these nominations, and in 1832 the present system of national conventions (see *post*, in Vol. II.) was introduced.

agreement. Like other crowds, a legislature must be led and ruled. Its merit lies not in the independence of its members, but in the reflex action of its opinion upon the leaders, in its willingness to defer to them in minor matters, reserving disobedience for the issues in which some great principle overrides both the obligation of deference to established authority and the respect due to special knowledge.

The above remarks answer the second question also. The spirit of party may seem to be weaker in Congress than in the people at large. But this is only because the questions which the people decide at the polls are always questions of choice between candidates for office. These are definite questions, questions eminently of a party character, because candidates represent in the America of to-day not principles but parties. Whenever a vote upon persons occurs in Congress, Congress gives a strict party vote. Were the people to vote at the polls on matters not explicitly comprised within a party platform, there would be the same uncertainty as Congress displays. The habit of joint action which makes the life of a party is equally intense in every part of the American system. But in England the existence of a Ministry and Opposition in Parliament sweeps within the circle of party action many topics which in America are left outside, and therefore Congress seems, but is not, less permeated than Parliament by party spirit.

CHAPTER XX

THE RELATIONS OF CONGRESS TO THE PRESIDENT[1]

So far as they are legislative bodies, the House and the Senate have similar powers and stand in the same relation to the executive.[2] We may therefore discuss them together, or rather the reader may assume that whatever is said of the House as a legislature is also true of the Senate. The Senate is also a semi-executive council, intended to advise and to restrain the President, but its functions in that capacity have been already discussed.[3]

Although the Constitution forbids any Federal official to be chosen a member of either the House or the Senate, there is nothing in it to prevent officials from speaking there; as indeed there is nothing to prevent either House from assigning places and the right to

[1] The relations of the various organs of government to one another in the United States are so interesting and so unlike those which exist in most European countries, that I have found it necessary to describe them with some minuteness, and from several points of view. In this chapter an account is given of the actual working relations of the President and Congress; in the next chapter the general theory of the respective functions of the executive and legislative departments is examined, and the American view of the nature of these functions explained; while in Chapter XXV. the American system as a whole is compared with the so-called "cabinet system" of England and her colonies.

[2] The House has the exclusive initiative in revenue bills; but this privilege does not affect what follows.

[3] See above, Chapter XI.

speak to any one whom it chooses. Now, however, no Federal officer appears on the floor. In the early days Washington came down and delivered his opening speech. Occasionally he remained in the Senate during a debate, and even expressed his opinion there. When Hamilton, the first secretary of the treasury, prepared his famous report on the national finances, he asked the House whether they would hear him speak it, or would receive it in writing. They chose the latter course, and the precedent then set has been followed by subsequent ministers,[1] while that set in 1801 by President Jefferson when he transmitted his message in writing instead of delivering a speech, has been similarly respected by all his successors. Thus neither House now hears a member of the executive. A committee may request the attendance of a minister and examine him, but he appears before it only as a witness to answer questions, not to state and argue his own case. There is therefore little direct intercourse between Congress and the administration, and no sense of interdependence and community of action such as exists

[1] Hamilton, however, was, while secretary, frequently present in Congress and addressed it. Nor has any rule ever been made by either House to prevent a secretary from doing so now. It is mere matter of custom. A bill was brought in some years ago giving seats in both Houses of Congress to cabinet ministers, and permitting them to speak on matters relating to their department, but not to join in general debate. This was provided in the Constitution of the Southern Confederacy (see note to Chapter XXVI. at the end of this volume). The President may of course come into the Senate, though he does not now address it. He does not go into the House of Representatives. Nor has any English king entered the House of Commons, except Charles I. in 1642, on the occasion of his attempt to seize the five members, when, says the *Journal*, "His Majesty came into the House and took Mr. Speaker's chair: 'Gentlemen, I am sorry to have this occasion to come unto you.'" The results did not encourage his successors to repeat the visit. But Charles II. and Anne were sometimes present during debates in the House of Lords; and there would not, it is conceived, be anything to prevent the Sovereign from being present now.

in other parliamentary countries.[1] Be it remembered also that a minister may never have sat in Congress, and may therefore be ignorant of its temper and habits. Three members of Mr. Cleveland's present cabinet have never had a seat in either House. The President himself, although he has been voted into office by his party, is not necessarily its leader, nor even one among its most prominent leaders. Hence he does not sway the councils and guide the policy of those members of Congress who belong to his own side. The expression of his wishes conveyed in a message has not necessarily any more effect on Congress than an article in a prominent party newspaper. No duty lies on Congress to take up a subject to which he has called attention as needing legislation; and, in fact, the suggestions which he makes, year after year, are usually neglected, even when his party has a majority in both Houses, or when the subject lies outside party lines.

The President and his cabinet have no recognized spokesman in either House. A particular senator or representative may be in confidential communication with them, and be the instrument through whom they seek to act; but he would probably disavow rather than claim the position of an exponent of ministerial wishes. The only means the President possesses of influencing members of Congress is through patronage. He may give places to them or their friends; he may approve or veto bills in which they are interested; his ministers may allot lucrative contracts to their nominees. This power is considerable, but covert, for the knowledge that it was being used might damage

[1] The House some years ago passed a bill for transferring Indian affairs from the Secretary of the Interior to the Secretary of War without consulting either official.

the member in public estimation and expose the executive to imputations. The consequence of cutting off open relations has been to encourage secret influence, which may of course be used for legitimate purposes, but which, being exerted in darkness, is seldom above suspicion. When the President or a minister is attacked in Congress, it is not the duty of any one there to justify his conduct. The accused official may send a written defence or may induce a member to state his case; but this method lacks the advantages of the European parliamentary system, under which the person assailed repels in debate the various charges, showing himself not afraid to answer fresh questions and grapple with new points. Thus by its exclusion from Congress the executive is deprived of the power of leading and guiding the legislature and of justifying in debate its administrative acts.

Next as to the power of Congress over the executive. Either House of Congress, or both Houses jointly, can pass resolutions calling on the President or his ministers to take certain steps, or censuring steps they have already taken. The President need not obey such resolutions, need not even notice them. They do not shorten his term or limit his discretion.[1] If the resolution be one censuring a minister, or demanding his dismissal, there is another ground on which the President may disregard it. The act is in law not the minister's act, but that of the President himself, and he does not

[1] In England a resolution of the House of Commons alone is treated as imperative in matters lying within the discretion of the executive, but then the House of Commons has the power of dismissing the Government if its wishes are disregarded. There have even been instances of late years in which the executive has ceased to put in force the provisions of an unrepealed statute, because the House of Commons has expressed its disapproval of that statute.

therefore escape responsibility by throwing over his adviser.

Either House of Congress can direct a committee to summon and examine a minister, who, though he might legally refuse to attend, never does refuse. The committee, when it has got him, can do nothing more than question him. He may evade their questions, may put them off the scent by dexterous concealments. He may with impunity tell them that he means to take his own course. To his own master, the President, he standeth or falleth.

Congress may refuse to the President the legislation he requests, and thus, by mortifying and embarrassing him, may seek to compel his compliance with its wishes. It is only a timid President, or a President greatly bent on accomplishing some end for which legislation is needed, who will be moved by such tactics.

Congress can pass bills requiring the President or any minister to do or abstain from doing certain acts of a kind hitherto left to his free will and judgment, may, in fact, endeavour to tie down the officials by prescribing certain conduct for them in great detail. The President will presumably veto such bills, as contrary to sound administrative policy. If, however, he signs them, or if Congress passes them by a two-thirds vote in both Houses over his veto, the further question may arise whether they are within the constitutional powers of Congress, or are invalid as unduly trenching on the discretion which the Constitution leaves to the President. If he (or a minister), alleging them to be unconstitutional, disobeys them, the only means of deciding whether he is right is by getting the point before the Supreme Court as an issue of law in some legal proceeding. This cannot always be done. If it is done, and the court

decide against the President, then if he still refuses to obey, nothing remains but to impeach him.

Impeachment, of which an account has already been given, is the heaviest piece of artillery in the congressional arsenal, but because it is so heavy it is unfit for ordinary use. It is like a hundred-ton gun which needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at. Or to vary the simile, impeachment is what physicians call a heroic medicine, an extreme remedy, proper to be applied against an official guilty of political crimes, but ill adapted for the punishment of small transgressions. Since 1789 it has been used only once against a President, and then, although that President (Andrew Johnson) had for two years constantly, and with great intemperance of language, so defied and resisted Congress that the whole machinery of government had been severely strained by the collision of the two authorities, yet the Senate did not convict him, because no single offence had been clearly made out. Thus impeachment does not tend to secure, and indeed was never meant to secure, the co-operation of the executive with Congress.

It accordingly appears that Congress cannot compel the dismissal of any official. It may investigate his conduct by a committee and so try to drive him to resign. It may request the President to dismiss him, but if his master stands by him and he sticks to his place, nothing more can be done. He may of course be impeached, but one does not impeach for mere incompetence or laxity, as one does not use steam hammers to crack nuts. Thus we arrive at the result, surprising to a European, that while Congress may examine the servants of the public to any extent, may

censure them, may lay down rules for their guidance, it cannot get rid of them. It is as if the directors of a company were forced to go on employing a manager whom they had ceased to trust, because it was not they but the shareholders who had appointed him.

There remains the power which in free countries has been long regarded as the citadel of parliamentary supremacy, the power of the purse. Congress has the sole right of raising money and appropriating it to the service of the state. Its management of national finance is significantly illustrative of the plan which separates the legislative from the executive. It has been shown in a preceding chapter that in this supremely important matter of raising and applying the public revenue, the executive government, instead of proposing and supervising, instead of securing that each department gets the money that it needs, that no money goes where it is not needed, that revenue is procured in the least troublesome and expensive way, that an exact yearly balance is struck, that the policy of expenditure is self-consistent and reasonably permanent from year to year, is by its exclusion from Congress deprived of influence on the one hand, of responsibility on the other. The chancellorship of the exchequer, to use an English expression, is put into commission, and divided between the chairmen of several unconnected committees of both Houses. A mass of business which, as English experience shows, specially needs the knowledge, skill, and economical conscience of a responsible ministry, is left to committees which are powerful but not responsible, and to Houses whose nominal responsibility is in practice sadly weakened by their want of appropriate methods and organization.

The question follows : How far does the power of the

purse enable Congress to control the President? Much less than in European countries. Congress may check any particular scheme which the President favours by refusing supplies for it. If he were to engage in military operations—he cannot under the Constitution "declare war" for that belongs to Congress—the House might paralyse him by declining to vote the requisite army appropriations. If he were to repeat the splendid audacity of Jefferson by purchasing a new territory, they could withhold the purchase money. But if, keeping within the limits of his constitutional functions, he takes a different course from that they recommend, if for instance he should refuse, at their repeated requests, to demand the liberation of American citizens pining in foreign dungeons, or to suppress disorders in a State whose government had requested Federal intervention, they would have to look on. To withhold the ordinary supplies, and thereby stop the machine of government, would injure the country and themselves far more than the President. They would, to use a common expression, be cutting off their nose to spite their face. They could not lawfully refuse to vote his salary, for that is guaranteed to him by the Constitution. They could not, except by a successful impeachment, turn him out of the White House or deprive him of his title to the obedience of all Federal officials.

Accordingly, when Congress has endeavoured to coerce the President by the use of its money powers, the case being one in which it could not attack him by ordinary legislation (either because such legislation would be unconstitutional, or for want of a two-thirds majority), it has proceeded not by refusing appropriations altogether, as the English House of Commons would do in like circumstances, but by attaching what

is called a "rider" to an appropriation bill. More than twenty years ago the House had formed the habit of inserting in bills appropriating money to the purposes of the public service, provisions relating to quite different matters, which there was not time to push through in the ordinary way.[1] In 1867 Congress used this device against President Johnson, with whom it was then at open war, by attaching to an army appropriation bill a clause which virtually deprived the President of the command of the army, entrusting its management to the general highest in command (General Grant). The President yielded, knowing that if he refused the bill would be carried over his veto by a two-thirds vote; and a usage already mischievous was confirmed. In 1879, the majority in Congress attempted to overcome, by the same weapon, the resistance of President Hayes to certain measures affecting the South which they desired to pass. They tacked these measures to three appropriation bills, army, legislative, and judiciary. The minority in both houses fought hard against the riders, but were beaten. The President vetoed all three bills, and Congress was obliged to pass them without the riders. Next session the struggle recommenced in the same form, and the President, by rejecting the money bills, again compelled Congress to drop the tacked provisions. This victory, which was of course due to the fact that the dominant party in Congress could not command a two-thirds majority, was deemed to have settled the question as between the executive and the legislature, and may have per-

[1] A leading member of the House, Mr. Reagan of Texas, said there that between 1862 and 1875, 375 measures of general legislation had been passed as provisoes upon appropriation bills. See Mr. Horace Davis's "American Constitutions," p. 30, in *Johns Hopkins University Studies*, Third Series.

manently discouraged the latter from recurring to the same tactics.

President Hayes in his veto messages argued strongly against the whole practice of tacking other matters to money bills. It has certainly caused great abuses, and is now forbidden by the constitutions of many States. Recently the President has urged upon Congress the desirability of so amending the Federal Constitution as to enable him, as a State governor is by some recent State constitutions allowed to do, to veto single items in an appropriation bill without rejecting the whole bill. Such an amendment is generally desired by enlightened men, because it would enable the executive to do its duty by the country in defeating many petty jobs which are now smuggled into these bills, without losing the supplies necessary for the public service which the bills provide. The change seems a small one, but its adoption would cure one of the defects due to the absence of ministers from Congress, and might save the nation millions of dollars a year, by diminishing wasteful expenditure on local purposes. But the process of amending the Constitution is so troublesome that even a change which involves no party issues may remain unadopted long after the best opinion has become unanimous in its favour.

CHAPTER XXI

THE LEGISLATURE AND THE EXECUTIVE

THE fundamental characteristic of the American National Government is its separation of the legislative, executive, and judicial departments. This separation is the merit which the Philadelphia Convention chiefly sought to attain, and which the Americans have been wont to regard as most completely secured by their Constitution. In Europe, as well as in America, men are accustomed to talk of legislation and administration as distinct. But a consideration of their nature will show that it is not easy to separate these two departments in theory by analysis, and still less easy to keep them apart in practice. We may begin by examining their relations in the internal affairs of a nation, reserving foreign policy for a later part of the discussion.

People commonly think of the Legislature as the body which lays down general rules of law, which prescribes, for instance, that at a man's death his children shall succeed equally to his property, or that a convicted thief shall be punished with imprisonment, or that a manufacturer may register his trade mark. They think of the Executive as the person or persons who do certain acts under those rules, who lock up convicts, register trade marks, carry letters, raise and pay

a police and an army. In finance the Legislature imposes a tax, the Executive gathers it, and places it in the treasury or in a bank, subject to legislative orders; the Legislature votes money by a statute, appropriating it to a specific purpose; the Executive draws it from the treasury or bank, and applies it to that purpose, perhaps in paying the army, perhaps in building a bridge.

The executive is, in civilized countries, itself the creature of the law, deriving therefrom its existence as well as its authority. Sometimes, as in France, it is so palpably and formally. The President of the Republic has been called into existence by the Constitution. Sometimes, as in England, it is so substantially, though not formally. The English Crown dates from a remote antiquity, when custom and belief had scarcely crystallized into law; and though Parliament has repeatedly determined its devolution upon particular persons or families—it is now held under the Act of Settlement—no statute has ever affected to confer upon it its rights to the obedience of the people. But practically it holds its powers at the pleasure of Parliament, which has in some cases expressly limited them, and in others given them a tacit recognition. We may accordingly say of England and of all constitutional monarchies as well as of republics that the executive in all its acts must obey the law, that is to say, if the law prescribes a particular course of action, the executive must take that course; if the law forbids a particular course, the executive must avoid it.

It is therefore clear that the extent of the power of the executive magistrate depends upon the particularity with which the law is drawn, that is, upon the amount of discretion which the law leaves to him. If the law is general in its terms, the executive has a wide discretion.

If, for instance, the law prescribes simply that a duty of ten per cent *ad valorem* be levied on all manufactured goods imported, it rests with the executive to determine by whom and where that duty shall be collected, and on what principles it shall be calculated. If the law merely creates a post-office, the executive may fix the rate of payment for letters and parcels, and the conditions on which they will be received and delivered. In these cases the executive has a large field within which to exert its free will and choice of means. Power means nothing more than the extent to which a man can make his individual will prevail against the wills of other men, so as to control them. Hence, when the law gives to a magistrate a wide discretion, he is powerful, because the law clothes his will with all the power of the state. On the other hand, if the law goes into very minute details, directing the official to do this and not to do that, it narrows the discretion of the executive magistrate. His personal will and choice are gone. He can no longer be thought of as a co-ordinate power in the state. He becomes a mere servant, a hand to carry out the bidding of the legislative brain, or, we may even say, a tool in the legislative hand.

As the legislature has been the body through which the people have chiefly asserted their authority, we find that in all free states law-making assemblies, whether primary or representative, have sought to extend their province and to subject the executive to themselves. They have done this in several ways. In the democracies of ancient Greece the assembly of all citizens not only passed statutes of general application, but made peace or declared war; ordered an expedition to start for Sphacteria, and put Cleon at the head of it; commanded the execution of prisoners or

reprieved them; conducted, in fact, most of the public business of the city by a series of direct decrees, all of which were laws, *i.e.* declarations of its sovereign will. It was virtually the government. The chief executive officers of Athens, called the generals, had little authority except over the military operations in the field. Even the Roman Constitution, a far more highly developed and scientific; though also a complicated and cumbrous system, while it wisely left great discretion to the chief magistrates (requiring them, however, to consult the Senate), yet permitted the passing *pro re nata* of important laws, which were really executive acts, such as the law by which Pompey received an extraordinary command against Mithridates. The Romans did not draw, any more than the Greek republics, a distinction between general and special legislation.[1]

This method, in which the people directly govern as a legislature, reducing the executive magistrates to passive instruments, is inapplicable where the country is large, because the mass of citizens cannot come together as an assembly. It is almost equally inapplicable where the legislature, though a representative body, is very numerous. England, accordingly, and the nations which have imitated England,[2] have taken a different method.

[1] The distinction between general legislative acts, which we call laws proper or statutes, and special legislative acts, ordering a particular thing to be done, is marked in Greek by the words νόμος and ψήφισμα; and in some cities, as in Athens, a νόμος could be passed or changed only by a specially provided method. At Rome everything done by the people was of equal legal force and called *lex* (though the word *privilegium* is sometimes applied to special acts). The distinction is apt to be forgotten under a despotic monarch, who is at once the executive and the legislative authority. Nevertheless, even under an autocrat, there are some general rules which his individual volition dares not change, because the universal opinion of the people approves them. The book of Daniel even represents Darius as unable to revoke a general law he has once sanctioned, or to except a particular person from its operation.

[2] But during and immediately after the great Civil War the Long

The people (that is, the qualified voters) have allowed an executive to subsist with apparently wide powers, but they virtually choose this executive, and keep it in so close and constant a dependence upon their pleasure, that it dare not act against what it believes their will to be. The struggle for popular liberties in England took at first the form of a struggle for the supremacy of law; that is to say, it was a struggle to restrain the prerogative of the king by compelling his ministers to respect the ancient customs of the land and the statutes passed in Parliament. As the customs were always maintained, and the range of the statutes constantly widened, the executive was by degrees hemmed in within narrow limits, its discretionary power restricted, and that characteristic principle of the Constitution, which has been well called "The Reign of Law," was established. It was settled that the law, *i.e.* the ancient customs and the statutes, should always prevail against the discretion of the Crown and its ministers, and that acts done by the servants of the Crown should be justiciable, exactly like the acts of private persons.[1] This once achieved, the executive fairly bitted and bridled, and the ministry made to hold office at the pleasure of the House of Commons, Parliament had no longer its former motive for seeking to restrict the discretion of the ministers of the Crown by minutely particular legislation, for ministers had become so accustomed to subjection that their discretion might be trusted. Parliament has, in fact, of late years begun to sail on

Parliament acted as both a legislative and an executive authority, as did the Convention through part of the French Revolution. And Parliament of course still retains its power of giving what are practically executive orders, *e.g.* it could pass a statute directing an expedition to seize a particular Pacific island.

[1] See Mr. Dicey's *Law of the Constitution* for a lucid exposition of this principle.

the other tack, and allows ministers to do many things by regulations, schemes, orders in council, and so forth, which would previously have been done by statute.[1]

It may be asked how it comes, if this be so, that people nevertheless talk of the executive in England as being a separate and considerable authority? The answer is twofold. The English Crown has never been, so to speak, thrown into the melting-pot and recast, but has continued, in external form and seeming, an independent and highly dignified part of the constitutional system.[2] Parliament has never asserted a direct control over certain parts of the royal prerogative, such as the bestowal of honours, the creation of peerages, the making of appointments to office. No one at this moment can say exactly what the royal prerogative does or does not include. And secondly, the actual executive, *i.e.* the

[1] In these cases, however (of which schemes under the Endowed Schools Acts may be taken as an instance), Parliament reserves to itself a right of veto in the form of an address to the Crown requesting that the regulation or scheme be not approved.

[2] An interesting illustration of the relations of the English executive to the legislature in the fourteenth and fifteenth centuries, when Parliament was little more than a pure legislature, is afforded by the present constitution of the tiny kingdom of the Isle of Man, the last survivor of those numerous kingdoms among which the British Isles were once divided. Its government is carried on by a Governor (appointed by the English Crown), a council of eight (composed partly of persons nominated by the Crown and partly of ex-officio members holding posts to which they have been appointed by the Crown), and an elected representative assembly of twenty-four. The assembly is purely legislative, and cannot check the Governor otherwise than by withholding the legislation he wishes for and such taxes as are annually voted. For the purposes of finance bills the assembly (House of Keys) and the council sit together but vote separately. The Governor presides, as the English king did in his Great Council. The Governor can stop any legislation he disapproves, and can retain his ministers against the will of the assembly. He is a true executive magistrate, commanding, moreover, like the earlier English kings, a considerable revenue which does not depend on the annual votes of the legislature. Here therefore is an Old-World instance of the American system as contradistinguished from the cabinet system of England and her colonies.

ministry of the day, retains some advantages which are practically, though not legally, immense. It has an initiative in all legislation, a sole initiative in financial legislation. It is a small and well organized body placed in the midst of a much larger and less organized body (*i.e.* the two Houses), on which therefore it can powerfully act. All patronage, ecclesiastical as well as civil, lies in its gift, and though it must not use this function so as to disgust the Commons, it has great latitude in the disposal of favours. While Parliament is sitting it disposes of a large part, sometimes (as in 1887) of the whole of the time of the House of Commons, and can therefore advance the measures it prefers, while retarding or evading motions it dislikes. During nearly half the year Parliament is not sitting, and the necessities of a great State placed in a restless world oblige a ministry to take momentous resolutions upon its own responsibility. Finally, it includes a few men who have obtained a hold on the imagination and confidence of the people, which emboldens them to resist or even to lecture Parliament, and often to prevail, not only against its first impulses, but possibly against its deliberate wishes. And an English ministry is strong not only because it so frankly acknowledges its dependence on the Commons as not to rouse the antagonism of that body, to which, be it remembered, most ministers belong, but also because it has another power outside to which it can, in extreme cases, appeal. It may dissolve Parliament, and ask the people to judge between its views and those of the majority of the House of Commons. Sometimes such an appeal succeeds. The power of making it is at all times a resource.

This delicate equipoise of the ministry, the House of Commons, and the nation acting at a general election,

is the secret of the smooth working of the British Constitution. It reappears in two remarkable Constitutions, which deserve fuller study than they have yet received from American or English publicists, those of Prussia and the new German Empire. There, however, the ministry is relatively stronger than in England, because the Crown retains not only a wider stretch of legal authority, but a greater moral influence over the people, who have had less practice than the English in working free institutions, and who never forget that they are soldiers, and the King-Emperor head of the army. A Prussian minister is so likely to have the nation on his side when he makes an appeal to it in the name of the King, and feels so confident that even if he defies the Chambers without dissolving, the nation will not be greatly stirred, that he sometimes refuses to obey the legislature. This is one of those exceptions which illustrate the rule. The legislature is prevented from gaining ground on the executive, not so much by the Constitution as by the occasional refusal of the executive to obey the Constitution, a refusal made in reliance on the ascendency of the Crown.

So far we have been considering domestic policy. The case of foreign affairs differs chiefly in this, that they cannot be provided for beforehand by laws general in application, but minutely particular in wording. A governing assembly may take foreign affairs into its own hand. In the republics of antiquity the Assembly did so, and was its own foreign office. The Athenian Assembly received ambassadors, declared war, concluded treaties. It got on well enough while it had to deal with other republics like itself, but suffered when the contest came to be with an astute diplomatist like Philip of Macedon. The Roman Senate conducted the foreign policy of Rome,

often with the skill to be expected from men of immense experience and ability, yet sometimes with a vacillation which a monarch would have been less likely to show. But the foreign relations of modern states are so numerous and complex, and so much entangled with commercial questions, that it has become necessary to create a staff of trained officials to deal with them. No large popular assembly could have either the time or the knowledge requisite for managing the ordinary business, much less could it conduct a delicate negotiation whose success would depend on promptitude and secrecy. Hence even democratic countries like France and England are forced to leave foreign affairs to a far greater degree than home affairs to the discretion of the ministry of the day. France reserves to the Chambers the power of declaring war or concluding a treaty. England has so far adhered to the old traditions as to leave both to the Crown, though the first, and in most cases the second, must be exerted with the virtual approval of Parliament. The executive is as distinctly responsible to the legislature, as clearly bound to obey the directions of the legislature, as in matters of domestic concern. But the impossibility which the legislature in countries like France and England finds in either assuming executive functions in international intercourse, or laying down any rules by law for the guidance of the executive, necessarily gives the executive a wide discretion and a correspondingly large measure of influence and authority. The only way of restricting this authority would be to create a small foreign affairs committee of the legislature and to empower it to sit when the latter was not sitting. And this extreme course neither France nor England has yet taken, because the dependence of the ministry on the majority of the legislature has

hitherto seemed to secure the conformity of the Foreign Office to the ideas and sentiments of that majority.

Before applying these observations to the United States, let us summarize the conclusions we have reached.

We have found that wherever the will of the people prevails, the legislature, since it either is or represents the people, can make itself omnipotent, unless checked by the action of the people themselves. It can do this in two ways. It may, like the republics of antiquity, issue decrees for particular cases as they arise, giving constant commands to all its agents, who thus become mere servants with no discretion left them. Or it may frame its laws with such particularity as to provide by anticipation for the greatest possible number of imaginable cases, in this way also so binding down its officials as to leave them no volition, no real authority.

We have also observed that every legislature tends so to enlarge its powers as to encroach on the executive; and that it has great advantages for so doing, because a succeeding legislature rarely consents to strike off any fetter its predecessor has imposed.

Thus the legitimate issue of the process would be the extinction or absorption of the executive as a power in the State. It would become a mere set of employés, obeying the legislature as the clerks in a bank obey the directors. If this does not happen, the cause is generally to be sought in some one or more of the following circumstances:—

The legislature may allow the executive the power of appealing to the nation against itself (England).[1]

The people may from ancient reverence or the habit

[1] In France the President can dissolve the Chambers, but only with the consent of the Senate.

of military submission be so much disposed to support the executive as to embolden the latter to defy the legislature (Prussia).

The importance of foreign policy and the difficulty of taking it out of the hands of the executive may be so great that the executive will draw therefrom an influence re-acting in favour of its general weight and dignity (Prussia, England, and, to some extent, France).

Let us now see how the founders of the American Constitution settled the relations of the departments. They were terribly afraid of a strong executive, and desired to reserve the final and decisive voice to the legislature, as representing the people. They could not adopt what I have called the Greek method of an assembly both executive and legislative, for Congress was to be a body with limited powers; continuous sittings would be inconvenient, and the division into two equally powerful houses would evidently unfit it to govern with vigour and promptitude. Neither did they adopt the English method of a legislature governing through an executive dependent upon it. It was urged in the Philadelphia Convention of 1787 that the executive ought to be appointed by and made accountable to the legislature, as being the supreme power in the national government. This was over-ruled, because the majority of the Convention were fearful of "democratic haste and instability," fearful that the legislature would, in any event, become too powerful, and therefore anxious to build up some counter authority to check and balance it. By making the President independent, and keeping him and his ministers apart from the legislature, the Convention thought they were strengthening him, as well as protecting it from attempts on his part to corrupt it.[1] They were also

[1] Their sense of the danger to a legislature from corruption by the

weakening him. He lost the initiative in legislation which the English executive enjoys. He had not the English King's power of dissolving the legislature, and throwing himself upon the country. Thus the executive magistrate seemed left at the mercy of the legislature. It could weave so close a network of statutes round him, like the net of iron links which Hephæstus throws over the lovers in the *Odyssey*, that his discretion, his individual volition, seemed to disappear, and he ceased to be a branch of the government, being nothing more than a servant working under the eye and at the nod of his master. This would have been an absorption of the executive into the legislature more complete than that of England, for the English prime minister is at any rate a leader, perhaps as necessary to his parliamentary majority as it is to him, whereas the President would have become a sort of superior police commissioner, irremovable during four years, but debarred from acting either on Congress or on the people.

Although the Convention may not have realized how helpless such a so-called Executive must be, they felt the danger of encroachments by an ambitious legislature, and resolved to strengthen him against it. This was done by giving the President a veto which it requires a two-thirds vote of Congress to override. In doing this they went back on their previous action. They had separated the President and his ministers from Congress. They now bestowed on him legislative functions, though in a different form. He became a distinct branch of the legislature, but for

executive was probably quickened by what they knew of the condition of the Irish Parliament, full, even after 1782, of placemen and pensioners. Much of the best blood of Ulster had emigrated to America in the preceding half century, and Irish politics must have excited a good deal of interest there.

negative purposes only. He could not propose, but he could refuse. Thus the executive was strengthened, not as an executive, but by being made a part of the legislature; and the legislature, already weakened by being divided into two co-equal houses, was further weakened by finding itself liable to be arrested in any new departure on which two-thirds of both houses were not agreed.

When the two houses are of one mind, and the party hostile to the President has a two-thirds majority in both, the Executive is almost powerless. It may be right that he should be powerless, because such majorities in both houses presumably indicate a vast preponderance of popular opinion against him.[1] The fact to be emphasized is, that in this case all "balance of powers" is gone. The legislature has swallowed up the executive, in virtue of the principle from which this discussion started, viz. that the executive is in free States only an agent who may be so limited by express and minute commands as to have no volition left him.

The strength of Congress consists in the right to pass statutes; the strength of the President in his right to veto them. But foreign affairs, as we have seen, cannot be brought within the scope of statutes. How then was the American legislature to deal with them? There were two courses open. One was to leave foreign affairs to the executive, as in England, giving Congress the same indirect control as the English Parliament enjoys over the Crown and ministry. This course could

[1] An exceptionally experienced observer (Mr. James G. Blaine) says (*Twenty Years of Congress*, vol. i. p. 185): "The practical deduction as to the working of our governmental system from the whole of that troublous period (the contest between President Johnson and Congress) is that two-thirds of each House united and stimulated to one end can practically neutralize the executive power of the government, and lay down its policy in defiance of the efforts and the opposition of the President."

not be taken, because the President is independent of Congress and irremovable during his term. The other course would have been for Congress, like a Greek assembly, to be its own foreign office, or to create a foreign affairs committee of its members to handle these matters. As the objections to this course, which would have excluded the chief magistrate from functions naturally incidental to his position as official representative of the nation, were overwhelmingly strong, a compromise was made. The initiative in foreign policy and the conduct of negotiations were left to him, but the right of declaring war was reserved to Congress, and that of making treaties to one, the smaller and more experienced, branch of the legislature. A measure of authority was thus suffered to fall back to the executive which would have served to raise materially his position had foreign questions played as large a part in American politics as they have in French or English. They have, however, been comparatively unimportant, especially since 1815.

It may be said that there was yet another source whence the executive might draw strength to support itself against the legislature, viz. those functions which the Constitution, deeming them necessarily incident to an executive, has reserved to the President and excluded from the competence of Congress. But examination shows that there is scarcely one of these which the long arm of legislation cannot reach. The President is commander-in-chief of the army, but the numbers and organization of the army are fixed by statute. The President makes appointments, but the Senate has the right of rejecting them, and Congress may pass Acts specifying the qualifications of appointees, and reducing the salary of any official except the President himself

and the judges. The real strength of the executive therefore, the rampart from behind which it can resist the aggressions of the legislature, is in ordinary times the veto power.[1] In other words, it survives as an executive in virtue not of any properly executive function, but of the share in legislative functions which it has received; it holds its ground by force, not of its separation from the legislature, but of its participation in a right properly belonging to the legislature.[2]

An authority which depends on a veto capable of being over-ruled by a two-thirds majority may seem frail. But the experience of a century has shown that, owing to the almost equal strength of the two great parties, the Houses often differ, and there is rarely a two-thirds majority of the same colour in both. Hence the Executive has enjoyed some independence. He is strong for defence, if not for attack. Congress can, except within that narrow sphere which the Constitution has absolutely reserved to him, baffle the President, can interrogate, check, and worry his ministers. But it can neither drive him the way it wishes

[1] In moments of public danger, as during the War of Secession, the executive of course springs up into immense power, partly because the command of the army is then of the first importance; partly because the legislature, feeling its unfitness for swift and secret decisions, gives free rein to the Executive, and practically puts its law-making powers at his disposal.

[2] What is said here of the national executive and national legislature is *a fortiori* true of the State executive and State legislatures. The State governor has no power of independent action whatever, being checked at every step by State statutes, and his discretion superseded by the minute directions which those statutes contain. He has not even ministers, because the other chief officials of the State are chosen, not by himself, but by popular vote. He has very little patronage; and he has no foreign policy at all. The State legislature would therefore prevail against him in everything, were it not for his veto and for the fact that the legislature is now generally restrained (by the provisions of the State constitution) from passing laws on many topics. (See *post*, Chapters XXXVII–XLV.

him to go, nor dismiss them for disobedience or incompetence.

An individual man has some great advantages in combating an assembly. His counsels are less distracted. His secrets are better kept. He may sow discord among his antagonists. He can strike a more sudden blow. Julius Cæsar was more than a match for the Senate, Cromwell for the Long Parliament, even Louis Napoleon for the French Assembly of 1851. Hence, when the President happens to be a strong man, resolute, prudent, and popular, he may well hope to prevail against a body whom he may divide by the dexterous use of patronage, may weary out by inflexible patience, may overawe by winning the admiration of the masses, always disposed to rally round a striking personality. But in a struggle extending over a long course of years an assembly has advantages over a succession of officers, especially of elected officers. The Roman Senate encroached on the consuls, though it was neither a legislature nor representative; the Carthaginian Councils encroached on the Suffetes; the Venetian Councils encroached on the Doge. Men come and go, but an assembly goes on for ever; it is immortal, because while the members change, the policy, the passion for extending its authority, the tenacity in clinging to what has once been gained, remain persistent. A weak magistrate comes after a strong magistrate, and yields what his predecessor had fought for; but an assembly holds all it has ever won.[1] Its pressure is

[1] This is still more conspicuously the case when the members of the executive government do not sit in the assembly. When they do, and lead it, their influence tends to restrain legislative encroachments. Even the presence of persons who are likely to be soon called on to form the executive has its influence. In 1886 a resolution moved in the House of Commons declaring that the executive ought to make no treaty without

steady and continuous; it is always, by a sort of natural process, expanding its own powers and devising new methods for fettering its rival. Thus Congress, though it is no more respected or loved by the people now than it was seventy years ago, though it has developed no higher capacity for promoting the best interests of the State, has succeeded in occupying nearly all the ground which the Constitution left debatable between the President and itself;[1] and would, did it possess a better internal organization, be even more plainly than it now is the supreme power in the government.

In their effort to establish a balance of power, the framers of the Constitution so far succeeded that neither power has subjected the other. But they underrated the inconveniences which arise from the disjunction of the two chief organs of government. They relieved the Administration from a duty which European ministers find exhausting and hard to reconcile with the proper performance of administrative work — the duty of giving attendance in the legislature and taking the lead in its debates. They secured continuity of executive policy for four years at least, instead of leaving government at the mercy of fluctuating majorities in an excitable assembly. But they so narrowed the sphere of the executive as to prevent it from leading the country, or even its own party in the country.

the previous consent of Parliament was resisted by the leaders of the Opposition as well as by the Government, partly because the former, feeling they might at any time be called back to power, had personal as well as public grounds for not desiring to see the executive fettered.

[1] The modification (in 1869) and repeal (in 1886) of the Tenure of Office Act (see above, p. 81) are scarcely instances to the contrary, because that Act, even if constitutional, had proved difficult to work.

Justice Miller observes (Oration at the Centennial Celebration of the framing of the Constitution, p. 20), "No department of the government has been more shorn of its just powers or crippled in the exercise of them than the Presidency."

They sought to make members of Congress independent, but in doing so they deprived them of some of the means which European legislators enjoy of learning how to administer, of learning even how to legislate in administrative topics. They condemned them to be architects without science, critics without experience, censors without responsibility.

CHAPTER XXII

THE FEDERAL COURTS

WHEN in 1788 the loosely confederated States of North America united themselves into a nation, national tribunals were felt to be a necessary part of the national government. Under the Confederation there had existed no means of enforcing the treaties made or orders issued by the Congress, because the courts of the several States owed no duty to that feeble body, and had little will to aid it. Now that a Federal legislature had been established, whose laws were to bind directly the individual citizen, a Federal judicature was evidently needed to interpret and apply these laws, and to compel obedience to them. The alternative would have been to entrust the enforcement of the laws to State courts. But State courts were not fitted to deal with matters of a quasi-international character, such as admiralty jurisdiction and rights arising under treaties. They supplied no means for deciding questions between different States. They could not be trusted to do complete justice between their own citizens and those of another State. Being under the control of their own State governments, they might be forced to disregard any Federal law which the State disapproved; or even

if they admitted its authority, might fail in the zeal or the power to give due effect to it. And being authorities co-ordinate with and independent of one another, with no common court of appeal placed over them to correct their errors or harmonize their views, they would be likely to interpret the Federal Constitution and statutes in different senses, and make the law uncertain by the variety of their decisions. These reasons pointed imperatively to the establishment of a new tribunal or set of tribunals, altogether detached from the States, as part of the machinery of the new government. Side by side of the thirteen (now thirty-eight) different sets of State courts, whose jurisdiction under State laws and between their own citizens was left untouched, there arose a new and complex system of Federal courts. The Constitution drew the outlines of the system. Congress perfected it by statutes; and as the details rest upon these statutes, Congress retains the power of altering them. Few American institutions are better worth studying than this intricate judicial machinery: few deserve more admiration for the smoothness of their working: few have more contributed to the peace and well-being of the country.

The Federal courts fall into three classes:—

The Supreme court, which sits at Washington.

The Circuit courts.

The District courts.

The Supreme court is directly created by Art. iii. § 1 of the Constitution, but with no provision as to the number of its judges. Originally there were six; at present there are nine, a chief justice, with a salary of $10,500 (£2100), and eight associate justices (salary $10,000). The justices are nominated by the President

and confirmed by the Senate. They hold office during good behaviour, *i.e.* they are removable only by impeachment. They have thus a tenure even more secure than that of English judges, for the latter may be removed by the Crown on an address from both Houses of Parliament.[1] Moreover, the English statutes secure the permanence only of the judges of the Supreme court of judicature, not also of judges of county or other local courts, while the provisions of the American Constitution are held to apply to the inferior as well as the superior Federal judges. The Fathers of the Constitution were extremely anxious to secure the independence of their judiciary, regarding it as a bulwark both for the people and for the States against aggressions of either Congress or the President.[2] They affirmed the life tenure by an unanimous vote in the Convention of 1787, because they deemed the risk of the continuance in office of an incompetent judge a less evil than the subserviency of all judges to the legislature, which might flow from a tenure dependent on legislative will. The result has justified their expectations. The judges have shown themselves independent of Congress and of party, yet the security of their position has rarely tempted them to breaches of judicial duty. Impeachment has been four times resorted to, once only against a justice of the Supreme court, and

[1] 12 and 13 William III., cap. 2.; cf. 1 George III., cap. 23. The occasional resistance of the parliament of Paris, whose members held office for life, to the French Crown may probably have confirmed the Convention of 1787 in its attachment to this English principle.

[2] See Hamilton in *Federalist*, No. lxxviii.: "The standard of good behaviour for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the legislative body."

then unsuccessfully.[1] Attempts have been made, beginning from Jefferson, who argued that judges should hold office for terms of four or six years only, to alter the tenure of the Federal judges, as that of the State judges has been altered in most States; but Congress has always rejected the proposed constitutional amendment.

The Supreme court sits at Washington from October till July in every year. The presence of six judges is required to pronounce a decision, a rule which, by preventing the division of the court into two or more branches, retards the despatch of business, though it has the advantage of securing a thorough consideration of every case. The sittings are held in the Capitol, in the chamber formerly occupied by the Senate, and the justices wear black gowns, being not merely the only public officers, but the only non-ecclesiastical persons of any kind whatever within the bounds of the United States who use any official dress.[2] Every case is discussed by the whole body twice over, once to ascertain the opinion of the majority, which is then directed to be set forth in a written judgment; then again when that written judgment, which one of the judges has prepared, is submitted for criticism and adoption as the judgment of the court.

The Circuit courts have been created by Congress under a power in the Constitution to establish "inferior courts." There are at present nine judicial circuits, in which courts are held annually. For each of these there has been appointed a Circuit judge (salary $6000),

[1] This was Samuel Chase of Maryland in 1804-5. The other three cases were of district Federal judges. Two were convicted (one of violence, apparently due to insanity, the other of rebellion), the third was acquitted.

[2] Save that of late years in one or two universities the president and professors have taken to wearing academic gowns on great occasions, such as the annual Commencement.

and to each there is also allotted one of the justices of the Supreme court. The Circuit court may be held either by the Circuit judge alone, or by the Supreme court Circuit justice alone, or by both together, or by either sitting along with the District judge (hereafter mentioned) of the district wherein the particular circuit court is held. An appeal lies from the Circuit court to the Supreme court, except in certain cases where the amount in dispute is small.

The District courts are the third and lowest class of Federal tribunals. They are at present fifty-five in number, and their judges receive salaries of from $3500 to $5000 (£700 to £1000) per annum. The Constitution does not expressly state whether they and the Circuit judges are to be appointed by the President and Senate like the members of the Supreme court; but it has always been assumed that such was its intention, and the appointments are so made accordingly.

For the purpose of dealing with the claims of private persons against the Federal government there has been established in Washington a special tribunal called the Court of Claims, with five justices (salary $4500), from which an appeal lies direct to the Supreme court.

The jurisdiction of the Federal courts extends to the following classes of cases, on each of which I say no more than what seems absolutely necessary to explain their nature.[1] All other cases have been left to

[1] "All the enumerated cases of Federal cognizance are those which touch the safety, peace, and sovereignty of the nation, or which presume that State attachments, State prejudices, State jealousies, and State interests might sometimes obstruct or control the regular administration of justice. The appellate power in all these cases is founded on the clearest principles of policy and wisdom, and is necessary in order to preserve uniformity of decision upon all subjects within the purview of the Constitution."—Kent's *Commentaries* (Holmes' edition), vol. i. p. 320.

the State courts, from which there does not lie (save as hereinafter specified) any appeal to the Federal courts.

1. "Cases in law and equity arising under the constitution, the laws of the United States and treaties made under their authority."

In order to enforce the supremacy of the national Constitution and laws over all State laws, it was necessary to place the former under the guardianship of the national judiciary. This provision accordingly brings before a Federal court every cause in which either party to a suit relies upon any Federal enactment. It entitles a plaintiff who bases his case on a Federal statute to bring his action in a Federal court: it entitles a defendant who rests his defence on a Federal enactment to have the action, if originally brought in a State court, removed to a Federal court.[1] But, of course, if the action has originally been brought in a State court, there is no reason for removing it unless the authority of the Federal enactment can be supposed to be questioned. Accordingly, the rule laid down by the Judiciary Act (1789) provides "for the removal to the supreme court of the United States of the final judgment or decree in any suit, rendered in the highest court of law or equity of a State in which a decision could be had, in which is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favour of their validity; or where any title, right, privilege, or im-

[1] The removal may be before or after judgment given, and in the latter event, by way of appeal or by writ of error.

munity is claimed under the Constitution, or any treaty or statute of a commission held or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority. But to authorize the removal under that act, it must appear by the record, either expressly or by clear and necessary intendment, that some one of the enumerated questions did arise in the State court, and was there passed upon. It is not sufficient that it might have arisen or been applicable. And if the decision of the State court is in favour of the right, title, privilege, or exemption so claimed, the Judiciary Act does not authorize such removal, neither does it where the validity of the State law is drawn in question, and the decision of the State court is against its validity."[1]

The rule seems intricate, but the motive for it and the working of it are plain. Where in any legal proceeding a Federal enactment has to be construed or applied by a State court, if the latter supports the Federal enactment, *i.e.* considers it to govern the case, and applies it accordingly, the supremacy of Federal law is thereby recognized and admitted. There is therefore no reason for removing the case to a Federal tribunal. Such a tribunal could do no more to vindicate Federal authority than the State court has already done. But if the decision of the State court has been against the applicability of the Federal law, it is only fair that the party who suffers by the decision should be entitled to Federal determination of the point, and he has

[1] Cooley, *Constitutional Limitations*, p. 16. For details regarding the removal of suits, and the restrictions when the amount in dispute is small, see Cooley, *Principles of Constitutional Law*, p. 122 *sqq.*; and see also the Act of 3d March 1887.

accordingly an absolute right to carry it before the Supreme court.

The principle of this rule is applied even to executive acts of the Federal authorities. If, for instance, a person has been arrested by a Federal officer, a State court has no jurisdiction to release him on a writ of *habeas corpus*, or otherwise to inquire into the lawfulness of his detention by Federal authority, because, as was said by Chief-Justice Taney, "The powers of the general government and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State court as if the line of division was traced by landmarks and monuments visible to the eye."[1]

2. "Cases affecting ambassadors, other public ministers, and consuls."

As these persons have an international character, it would be improper to allow them to be dealt with by a State court which has nothing to do with the national government, and for whose learning and respectability there may exist no such securities as those that surround the Federal courts.

3. "Cases of admiralty and maritime jurisdiction."

These are deemed to include not only prize cases but all maritime contracts, and all transactions relating to navigation, as well on the navigable lakes and rivers of the United States as on the high seas.

4. "Controversies to which the United States shall be a party."

[1] *Ableman* v. *Booth*, 21 How. 516; and see Cooley, *Constitutional Limitations*, p. 429.

This provision is obviously needed to protect the United States from being obliged to sue or be sued in a State court, to whose decision the national government could not be expected to submit. When a pecuniary claim is sought to be established against the Federal government, the proper tribunal is the Court of Claims.

5. "Controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens, or subjects."

In all these cases a State court is likely to be, or at any rate to seem, a partial tribunal, and it is therefore desirable to vest the jurisdiction in judges equally unconnected with the plaintiff and the defendant. By securing recourse to an unbiassed and competent tribunal, the citizens of every State obtain better commercial facilities than they could otherwise count upon, for their credit will stand higher with persons belonging to other States if the latter know that their legal rights are under the protection, not of local and possibly prejudiced judges, but of magistrates named by the national government, and unamenable to local influences.[1]

One important part of the jurisdiction here conveyed has been subsequently withdrawn from the Federal judicature. When the Constitution was submitted to the people, a principal objection urged against it was that it exposed a State, although a sovereign common-

[1] There are countries in Europe with which English merchants are unwilling to do business because they can seldom obtain justice from the courts against a native. Local feeling was, of course, much stronger in the America of 1787 than it is now. Englishmen who had claims against American citizens failed to obtain their enforcement from 1783 till the Federal courts were established in 1789.

wealth, to be sued by the individual citizens of some other State. That one State should sue another was perhaps necessary, for what other way could be discovered of terminating disputes? But the power as well as the dignity of a State would be gone if it could be dragged into court by a private plaintiff. Hamilton (writing in the *Federalist*) met the objection by arguing that the jurisdiction-giving clause of the Constitution ought not to be so construed, but must be read as being subject to the general doctrine that a sovereign body cannot be sued by an individual without its own consent, a doctrine not to be excluded by mere implication but only by express words.[1] However, in 1793 the Supreme court, in the famous case of *Chisholm* v. *The State of Georgia*,[2] construed the Constitution in the very sense which Hamilton had denied, holding that an action did lie against Georgia at the suit of a private plaintiff; and when Georgia protested and refused to appear, the court proceeded (in 1794) to give judgment against her by default in case she should not appear and plead before a day fixed. Her cries of rage filled the Union, and brought other States to her help. An amendment (the eleventh) to the Constitution was passed through Congress and duly accepted by the requisite majority of the States, which declares that "the judicial power of the United States shall not be construed to extend to any suit commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign state."[3]

[1] *Federalist*, No. lxxxi. The same view was contemporaneously maintained by John Marshall (afterwards Chief-Justice) in the Virginia Convention of 1788.

[2] 2 Dall. 419.

[3] It has been held that the amendment applies only when a State is a party to the record, and therefore does not apply to the case of a State holding shares in a corporation. Neither does it apply to appeals and writs of error.

Under the protection of this amendment, not a few States have with impunity repudiated their debts.[1]

The jurisdiction of the Supreme court is original in cases affecting ambassadors, and wherever a State is a party; in other cases it is appellate; that is, cases may be brought to it from the inferior Federal courts and (under the circumstances before mentioned) from State courts. The jurisdiction is in some matters exclusive, in others concurrent with that of the State courts. Upon these subjects there have arisen many difficult and intricate questions, which I must pass by, because they would be unintelligible without long explanations.[2] One point, however, may be noted. The State courts cannot be invested by Congress with any jurisdiction, for Congress has no authority over them, and is not permitted by the Constitution to delegate any judicial powers to them. Hence the jurisdiction of a State court, wherever it is concurrent with that of Federal judges, is a jurisdiction which the court possesses of its own right, independent of the Constitution. And in some instances where congressional statutes have purported to impose duties on State courts, the latter have refused to accept and discharge them.

The criminal jurisdiction of the Federal courts, which

[1] Quite recently (February 1, 1886), a decision has been pronounced requiring the State of Virginia to accept in payment of taxes coupons in terms made by her law so receivable, and attached to bonds which she had repudiated. The circumstances of this case are very intricate, but the above is the broad result. The decision was pronounced by five justices against four, the minority holding that the Eleventh Amendment must be taken to govern the case.

[2] The lawyer who is curious in such matters may be referred to Story's *Commentaries on the Constitution* (4th edition by Judge Cooley), chapter xxxviii., and to the judgments of Chief-Justice Marshall in the cases of *Martin* v. *Hunter* (1 Wheat. 304) and *Cohens* v. *Virginia* (6 Wheat. 406).

extends to all offences against Federal law, is purely statutory. "The United States as such can have no common law. It derives its powers from the grant of the people made by the Constitution, and they are all to be found in the written law, and not elsewhere."[1]

The procedure of the Federal courts is prescribed by Congress, subject to some few rules contained in the Constitution, such as those which preserve the right of trial by jury in criminal cases[2] and suits at common law.[3] As "cases in law and equity" are mentioned, it is held that Congress could not accomplish such a fusion of law and equity as has been effected in several States of the Union, and was recently effected in England,[4] but must maintain these methods of procedure as distinct, though administered by the same judges.

The law applied in the Federal courts is of course first and foremost that enacted by the Federal legislature, which, when it is applicable, prevails against any State law. But very often, as for instance in suits between citizens of different States, Federal law does not, or does only in a secondary way, come in question. In such instances the first thing is to determine what law it is that ought to govern the case, each State having a law of its own; and when this has been ascertained, it is applied to the facts, just as an English court would apply French or Scotch law in pronouncing on the validity of a marriage contracted in France or Scotland. In administering the law of any State (including its constitution, its statutes, and its common law, which in Louisiana is the civil law in its French form) the Federal courts ought to follow the decisions of the State courts,

[1] Cooley, *Principles*, p. 131.
[2] Art. iii. § 2.
[3] Amendment vii. § 1.
[4] By the Judicature Act, 1873.

treating those decisions as the highest authority on the law of the particular State. This doctrine is so fully applied that the Supreme court has even over-ruled its own previous determinations on a point of State law in order to bring itself into agreement with the view of the highest court of the particular State. Needless to say, the State courts follow the decisions of the Federal courts upon questions of Federal law.[1]

For the execution of its powers each Federal court has attached to it an officer called the United States marshal, corresponding to the sheriff in the State governments, whose duty it is to carry out its writs, judgments, and orders by arresting prisoners, levying execution, putting persons in possession, and so forth. He is entitled, if resisted, to call on all good citizens for help; if they will not or cannot render it, he must refer to Washington and obtain the aid of Federal troops. There exists also in every judiciary district a Federal public prosecutor, called the United States district attorney, who institutes proceedings against persons transgressing Federal laws or evading the discharge of obligations to the Federal treasury. Both sets of officials are under the direction of the attorney-general, as head of the department of justice. They constitute a net-work of Federal authorities covering the whole territory of the Union, and independent of the officers of the

[1] "The judicial department of every government is the appropriate organ for construing the legislative acts of that government. . . . On this principle the construction given by this (the supreme) court to the Constitution and laws of the United States is received by all as the true construction; and on the same principle the construction given by the courts of the various States to the legislative acts of those States is received as true, unless they come in conflict with the Constitution, laws, or treaties of the United States."—Marshall, C.-J., in *Elmendorf* v. *Taylor*, 10 Wheat. 109.

State courts and of the public prosecutors who represent the State governments. Where a State maintains a gaol for the reception of Federal prisoners, the U.S. marshal delivers his prisoners to the State gaoler; where this provision is wanting, he must himself arrange for their custody.

The French or English reader may ask how it is possible to work a system so extremely complex, under which every yard of ground in the Union is covered by two jurisdictions, with two sets of judges and two sets of officers, responsible to different superiors, their spheres of action divided only by an ideal line, and their action liable in practice to clash. The answer is that the system does work, and now, after a hundred years of experience, works smoothly. It is more costly than the simpler systems of France, Prussia, or England, though, owing to the small salaries paid, the expense falls rather on litigants than on the public treasury. But it leads to few conflicts or heart-burnings, because the key to all difficulties is found in the principle that wherever Federal law is applicable Federal law must prevail, and that every suitor who contends that Federal law is applicable is entitled to have the point determined by a Federal court. The acumen of the lawyers and judges, the wealth of accumulated precedents, make the solution of these questions of applicability and jurisdiction easier than a European practitioner can realize: while the law-abiding habits of the people and their sense that the supremacy of Federal law and jurisdiction works to the common benefit of the whole people, secure general obedience to Federal judgments. The enforcement of the law, especially the criminal law, in some parts of America leaves much to be desired; but the difficulties which arise are now due not to conflicts between State

and Federal pretensions but to other tendencies equally hostile to both authorities.

A word in conclusion as to the separation of the judicial from the other two departments, a point on which the framers of the Constitution laid great stress. The functions of the legislature are more easily distinguished from those of the judiciary than from those of the executive. The legislature makes the law, the judiciary applies it to particular cases by investigating the facts and, when these have been ascertained, by declaring what rule of law governs them. Nevertheless, there are certain points in which the functions of the two departments touch, certain ground which is debatable between the judiciary on the one hand and the legislature on the other. In most countries the courts have grown out of the legislature; or rather, the sovereign body, which, like Parliament, was originally both a law court and a legislature, has delivered over most of its judicial duties to other persons, while retaining some few to be still exercised by itself.

In most points America has followed the principles and practice of England. Like England, she creates no separate administrative tribunals such as exist in the states of the European continent, but allows officials to be sued in or indicted before the ordinary courts. Like England, she has given the judges (*i.e.* the Federal judges) a position secured against the caprice of the legislature or executive. Like England, she recognizes judicial decisions as law until some statute has set them aside.[1] In one respect she has improved on England—viz. in forbidding the legislature to exercise the powers

[1] Assuming the statute to be one within the competence of the legislature which has passed it.

of a criminal court, by passing acts of attainder or of pains and penalties, measures still legal, though virtually obsolete, in England.[1] In others, she stands behind England. England has practically ceased to use one branch of her Parliament as a court for the trial of impeachments. America still occasionally throws upon one House of Congress this function; which though it is ill suited to an ordinary court of justice, is scarcely better discharged by a political assembly. England has remitted to the courts of law the trial of disputed parliamentary elections; America still reserves these for committees of Congress. Special and local bills which vest in private hands certain rights of the State, such as public franchises, or the power of taking private property against the owner's will, are, though in form exercises of legislative power, really fitter to be examined and settled by judicial methods than by the loose opinion, the private motives, the lobbying, which determine legislative decisions where the control of public opinion is insufficiently provided for. England accordingly, though she refers such bills to committees of Parliament, directs these committees to apply a quasi-judicial procedure, and to decide according to the evidence tendered. America takes no such securities, but handles these bills like any others. Here therefore we see three pieces of ground debatable between the legislature and the judiciary. All of them originally belonged to the legislature. All in America still belong to it. England, however, has abandoned the first, has delivered over the second to the judges,

[1] Neither House of Congress can punish a witness for contempt, after the fashion of the British Parliament (*Kilbourn* v. *Thompson*, 103 U.S. p. 168). See note to Chapter XXXIII. *post*.

and treats the third as matter to be dealt with by judicial rather than legislative methods. Such points of difference are worth noting, because the impression has prevailed in Europe that America is the country in which the province of the judiciary has been most widely extended.

CHAPTER XXIII

THE COURTS AND THE CONSTITUTION

No feature in the government of the United States has awakened so much curiosity in the European mind, caused so much discussion, received so much admiration, and been more frequently misunderstood, than the duties assigned to the Supreme Court and the functions which it discharges in guarding the ark of the Constitution. Yet there is really no mystery about the matter. It is not a novel device. It is not a complicated device. It is the simplest thing in the world if approached from the right side.

In England and many other modern States there is no difference in authority between one statute and another. All are made by the legislature: all can be changed by the legislature. What are called in England constitutional statutes, such as Magna Charta, the Bill of Rights, the Act of Settlement, the Acts of Union with Scotland and Ireland, are merely ordinary laws; which could be repealed by Parliament at any moment in exactly the same way as it can repeal a highway act or lower the duty on tobacco. The habit has grown up of talking of the British Constitution as if it were a fixed and definite thing. But there is in England no such thing as a Constitution

apart from the rest of the law: there is merely a mass of law, consisting partly of statutes and partly of decided cases and accepted usages, in conformity with which the government of the country is carried on from day to day, but which is being constantly modified by fresh statutes and cases. The same thing existed in ancient Rome, and everywhere in Europe a century ago. It is, so to speak, the "natural," and used to be the normal, condition of things in all countries, free or despotic.

The condition of America is wholly different. There the name Constitution designates a particular instrument adopted in 1788, amended in some points since, which is the foundation of the national government. This Constitution was ratified and made binding, not by Congress, but by the people acting through conventions assembled in the thirteen States which then composed the Confederation. It created a legislature of two houses; but that legislature, which we call Congress, has no power to alter it in the smallest particular. That which the people have enacted, the people only can alter or repeal.

Here therefore we observe two capital differences between England and the United States. The former has left the outlines as well as the details of her system of government to be gathered from a multitude of statutes and cases. The latter has drawn them out in one comprehensive fundamental enactment. The former has placed these so-called constitutional laws at the mercy of her legislature, which can abolish when it pleases any institution of the country, the Crown, the House of Lords, the Established Church, the House of Commons, Parliament itself.[1] The latter has placed

[1] Parliament of course cannot restrict its own powers by any par-

her Constitution altogether out of the reach of Congress, providing a method of amendment whose difficulty is shown by the fact that it has been very sparingly used.

In England Parliament is omnipotent. In America Congress is doubly restricted. It can make laws only for certain purposes specified in the Constitution, and in legislating for these purposes it must not transgress any provision of the Constitution itself. The stream cannot rise above its source.

Suppose, however, that Congress does so transgress, or does overpass the specified purposes. It may do so intentionally: it is likely to do so inadvertently. What happens? If the Constitution is to be respected, there must be some means of securing it against Congress. If a usurpation of power is attempted, how is it to be checked? If a mistake is committed, who sets it right?

The point may be elucidated by referring it to a wider category, familiar to lawyers and easily comprehensible by laymen, that of acts done by an agent for a principal. If a landowner directs his bailiff to collect rents for him, or to pay debts due to tradesmen, the bailiff has evidently no authority to bind his employer by any act beyond the instructions given him, as, for instance, by contracting to buy a field. If a manufacturer directs his foreman to make rules for the hours of work and meals in the factory, and the foreman

ticular Act, because that Act might be repealed in a subsequent session, and indeed any subsequent Act inconsistent with any of its provisions repeals *ipso facto* that provision. (For instance, the Act of Union with Scotland (6 Anne, c. 11) declared certain provisions of the Union, for the establishment of Presbyterian church government in Scotland, to be "essential and fundamental parts of the Union," but some of those provisions have been altered by subsequent statutes.) Parliament, could, however, extinguish itself by legally dissolving itself, leaving no legal means whereby a subsequent Parliament could be summoned.

makes rules not only for those purposes, but also prescribing what clothes the workmen shall wear and what church they shall attend, the latter rules have not the force of the employer's will behind them, and the workmen are not to be blamed for neglecting them.

The same principle applies to public agents. In every country it happens that acts are directed to be done and rules to be made by bodies which are in the position of agents, *i.e.* which have received from some superior authority a limited power of acting and of rule-making, a power to be used only for certain purposes or under certain conditions. Where this power is duly exercised, the act or rule of the subordinate body has all the force of an act done or rule made by the superior authority, and is deemed to be made by it. And if the latter be a law-making body, the rule of the subordinate body is therefore also a law. But if the subordinate body attempts to transcend the power committed to it, and makes rules for other purposes or under other conditions than those specified by the superior authority, these rules are not law, but are null and void. Their validity depends on their being within the scope of the law-making power conferred by the superior authority, and as they have passed outside that scope they are invalid. They do not justify any act done under them forbidden by the ordinary law. They ought not to be obeyed or in any way regarded by the citizens, because they are not law.

The same principle applies to acts done by an executive officer beyond the scope of his legal authority. In free countries an individual citizen is justified in disobeying the orders of a magistrate if he correctly thinks these orders to be in excess of the

magistrate's legal power, because in that case they are not really the orders of a magistrate, but of a private person affecting to act as a magistrate. In England, for instance, if a secretary of state, or a police constable, does any act which the citizen affected by it rightly deems unwarranted, the citizen may resist, by force if necessary, relying on the ordinary courts of the land to sustain him. This is a consequence of the English doctrine that all executive power is strictly limited by the law, and is indeed a corner-stone of English liberty.[1] It is applied even as against the dominant branch of the legislature. If the House of Commons should act in excess of the power which the law and custom of Parliament has secured to it, a private individual may resist the officers of the House and the courts will protect him by directing him to be acquitted if he is prosecuted, or, if he is plaintiff in a civil action, by giving judgment in his favour.

An obvious instance of the way in which rules or laws made by subordinate bodies are treated is afforded by the bye-laws made by an English railway company or municipal corporation under powers conferred by an Act of Parliament. So long as these bye-laws are within the scope of the authority which the Act of Parliament has given, they are good, *i.e.* they are laws, just as much as if enacted in the Act. If they go beyond it, they are bad, that is to say, they bind nobody and cannot be enforced. If a railway company

[1] See as to the different doctrine and practice of the European continent, and particularly as to the "administrative law" of France, the instructive remarks of Mr. Dicey in his *Law of the Constitution*. The view he there takes of the relation of the Federal Constitution to Congress coincides in most points with that presented in the present chapter, which, however, was written before his book appeared.

which has received power to make bye-laws imposing fines up to the amount of forty shillings, makes a bye-law punishing any person who enters or quits a train in motion with a fine of fifty shillings or a week's imprisonment, that bye-law is invalid, that is to say, it is not law at all, and no magistrate can either imprison or impose a fine of fifty shillings on a person accused of contravening it. If a municipal corporation has been by statute empowered to enter into contracts for the letting of lands vested in it, and directed to make bye-laws, for the purpose of letting, which shall provide, among other things, for the advertising of all lands intended to be let, and if it makes a bye-law in which no provision is made for advertising, and under that bye-law contracts for the letting of a piece of land, the letting made in pursuance of this bye-law is void, and conveys no title to the purchaser. All this is obvious to a lay as well as to a legal mind; and it is no less obvious that the question of the validity of the bye-law, and of what has been done under it, is one to be decided not by the municipal corporation or company, but by the courts of justice of the land.

Now, in the United States the position of Congress may for this purpose be compared to that of an English municipal corporation or railway company. The supreme law-making power is the People, that is, the qualified voters, acting in a prescribed way. The people have by their supreme law, the Constitution, given to Congress a delegated and limited power of legislation. Every statute passed under that power conformably to the Constitution has all the authority of the Constitution behind it. Any statute passed which goes beyond that power is invalid, and incapable of enforcement. It is in fact not a statute at all, because Congress in passing it

was not really a law-making body, but a mere group of private persons.

There is of course this enormous difference between Congress and any subordinate law-making authority in England, that Congress is supreme within its proper sphere, the people having no higher permanent organ to override or repeal such statutes as Congress may pass within that sphere; whereas in England there exists in Parliament a constantly present supervising authority, which may at any moment cancel or modify what any subordinate body may have enacted, whether within or without the scope of its delegated powers. This is a momentous distinction. But it does not affect the special point which I desire to illustrate, viz. that a statute passed by Congress beyond the scope of its powers is of no more effect than a bye-law made *ultra vires* by an English municipality. There is no mystery so far: there is merely an application of the ordinary principles of the law of agency. But the question remains, How and by whom, in case of dispute, is the validity or invalidity of a statute to be determined?

Such determination is to be effected by setting the statute side by side with the Constitution, and considering whether there is any discrepancy between them. Is the purpose of the statute one of the purposes mentioned or implied in the Constitution? Does it in pursuing that purpose contain anything which violates any clause of the Constitution? Sometimes this is a simple question, which an intelligent layman may answer. More frequently it is a difficult one, which needs not only the subtlety of the trained lawyer, but a knowledge of former cases which have thrown light on the same or a similar point. In any event it is an important question, whose solution ought to proceed

from a weighty authority. It is a question of interpretation, that is, of determining the true meaning both of the superior law and of the inferior law, so as to discover whether they are inconsistent.

Now the interpretation of laws belongs to courts of justice. A law implies a tribunal, not only in order to direct its enforcement against individuals, but to adjust it to the facts, *i.e.* to determine its precise meaning and apply that meaning to the circumstances of the particular case. The legislature, which can only speak generally, makes every law in reliance on this power of interpretation. It is therefore obvious that the question, whether a congressional statute offends against the Constitution, must be determined by the courts, not merely because it is a question of legal construction, but because there is nobody else to determine it. Congress cannot do so, because Congress is a party interested. If such a body as Congress were permitted to decide whether the acts it had passed were constitutional, it would of course decide in its own favour, and to allow it to decide would be to put the Constitution at its mercy. The President cannot, because he is not a lawyer, and he also may be personally interested. There remain only the courts, and these must be the National or Federal courts, because no other courts can be relied on in such cases. So far again there is no mystery about the matter.

Now, however, we arrive at a feature which complicates the facts, though it introduces no new principle. The United States is a federation of commonwealths, each of which has its own constitution and laws. The Federal Constitution not only gives certain powers to Congress, as the national legislature, but recognizes certain powers in the States, in virtue whereof their respective peoples have enacted fundamental State laws

(the State constitutions) and have enabled their respective legislatures to pass State statutes. However, as the nation takes precedence of the States, the Federal Constitution, which is the supreme law of the land everywhere, and the statutes duly made by Congress under it, are preferred to all State constitutions and statutes; and if any conflict arise between them, the latter must give way. The same phenomenon therefore occurs as in the case of an inconsistency between the Constitution and a congressional statute. Where it is shown that a State constitution or statute infringes either the Federal Constitution or a Federal (*i.e.* congressional) statute, the State constitution or statute must be held and declared invalid. And this declaration must, of course, proceed from the courts, nor solely from the Federal courts; because when a State court decides against its own statutes or constitution in favour of a Federal law, its decision is final.[1]

It will be observed that in all this there is no conflict between the law courts and any legislative body. The conflict is between different kinds of laws. The duty of the judges is as strictly confined to the interpretation of the laws cited to them as it is in England or France; and the only difference is that in America there are laws of four different degrees of authority, whereas in England all laws (excluding mere bye-laws, Privy Council ordinances, etc.) are equal because all proceed from Parliament. These four kinds of American laws are :—

I. The Federal Constitution.
II. Federal statutes.

[1] When the State court decides against the applicability of a Federal law the case may be removed to a Federal court. See above, p. 311.

III. State constitutions.
IV. State statutes.[1]

The American law court therefore does not itself enter on any conflict with the legislature. It merely secures to each kind of law its due authority. It does not even preside over a conflict and decide it, for the relative strength of each kind of law has been settled already. All the court does is to point out that a conflict exists between two laws of different degrees of authority. Then the question is at an end, for the weaker law is extinct.

This is the abstract statement of the matter; but there is also an historical one. Many of the American colonies received charters from the British Crown, which created or recognized colonial assemblies, and endowed these with certain powers of making laws for the colony. Such powers were of course limited, partly by the charter, partly by usage, and were subject to the superior authority of the Crown or of the British Parliament. Questions sometimes arose in colonial days whether the statutes made by these assemblies were in excess of the powers conferred by the charter; and if the statutes were found to be in excess, they were held invalid by the courts, that is to say, in the first instance, by the colonial courts, or, if the matter was carried to England, by the Privy Council.[2]

[1] Of these, the Federal Constitution prevails against all other laws. Federal statutes, if made in pursuance of and conformably to the Constitution, prevail against III. and IV. If in excess of the powers granted by the Constitution, they are wholly invalid. A State Constitution yields to I. and II., but prevails against the statutes of the State.

[2] The same thing happens even now as regards the British colonies. The question was lately argued before the Privy Council whether the legislature of the Dominion of Canada, created by the British North America Act of 1867 (an imperial statute), had power to extinguish the right of appeal from the supreme court of Canada to the British Queen in council.

When the thirteen American colonies asserted their independence in 1776, they replaced these old charters by new constitutions,[1] and by these constitutions entrusted their respective legislative assemblies with certain specified and limited legislative powers. The same question was then liable to recur with regard to a statute passed by one of these assemblies. If such a statute was in excess of the power which the State constitution conferred on the State legislature, or in any way transgressed the provisions of that constitution, it was invalid, and acts done under it were void. The question, like any other question of law, came for decision before the courts of the State. Thus, in 1786, the supreme court of Rhode Island held a statute of the legislature void, on the ground that it made a penalty collectible on summary conviction, without trial by jury; the colonial charter, which was then still in force as the constitution of the State, having secured the right of trial by jury in all cases.[2] When the Constitution of the United States came into operation in 1789, and was declared to be paramount to all State constitutions and State statutes, no new principle was introduced; there was merely a new application, as between the nation and the States, of the old doctrine that a subordinate and limited legislature cannot pass beyond the limits fixed for it. It was clear, on general principles, that a State law incompatible with a Federal law must give way; the only question was: What courts are to pronounce upon the ques-

[1] Connecticut and Rhode Island, however, went on under the old charters, with which they were well content. See as to this whole subject, Chapter XXXVII. in Vol. II., on State Constitutions.

[2] See as to this interesting case (*Trevett* v. *Weedon*), the first in which a legislative act was declared unconstitutional for incompatibility with a State constitution, Cooley's *Constitutional Limitations*, p. 106 note.

tion whether such incompatibility exists? Who is to decide whether or no the authority given to Congress has been exceeded, and whether or no the State law contravenes the Federal Constitution or a Federal statute?

In 1789 the only pre-existing courts were the State courts. If a case coming before them raised the point whether a State constitution or statute was inconsistent with the Federal Constitution or a statute of Congress, it was their duty to decide it, like any other point of law. But their decision could not safely be accepted as final, because, being themselves the offspring of, and amenable to the State governments, they would naturally tend to uphold State laws against the Federal Constitution or statutes. Hence it became necessary to call in courts created by the central Federal authority and co-extensive with it—that is to say, those Federal courts which have been already described. The matter seems complicated, because we have to consider not only the superiority of the Federal Constitution to the Federal Congress, but also the superiority of both the Federal Constitution and Federal statutes to all State laws. But the principle is the same and equally simple in both sets of cases. Both are merely instances of the doctrine, that a law-making body must not exceed its powers, and that when it has attempted to exceed its powers, its so-called statutes are not laws at all, and cannot be enforced.

In America the supreme law-making power resides in the people. Whatever they enact binds all courts whatsoever. All other law-making bodies are subordinate, and the enactments of such bodies must conform to the supreme law, else they will perish at its touch, as a fishing smack goes down before an ocean steamer. And

these subordinate enactments, if at variance with the supreme law, are invalid from the first, although their invalidity may remain for years unnoticed or unproved. It can be proved only by the decision of a court in a case which raises the point for determination. The phenomenon cannot arise in a country whose legislature is omnipotent, but naturally[1] arises wherever we find a legislature limited by a superior authority, such as a constitution which the legislature cannot alter

In England the judges interpret Acts of Parliament exactly as American judges interpret statutes coming before them. If they find an Act conflicting with a decided case, they prefer the Act to the case, as being of higher authority. As between two conflicting Acts, they prefer the later, because it is the last expression of the mind of Parliament. If they misinterpret the mind of Parliament, *i.e.* if they construe an Act in a sense which Parliament did not really intend, their decision is nevertheless valid, and will be followed by other courts[2] until Parliament speaks its mind again by another Act. The only difference between their position and that of their American brethren is that they have never to distinguish between the authority of one enactment and of another, otherwise than by looking to the date, and that they have therefore never to inquire whether an Act of Parliament was invalid when first passed. In-

[1] I do not say "necessarily," because there are countries on the European continent where, although there exists a constitution superior to the legislature, the courts are not allowed to hold a legislative act invalid, because the legislature is deemed to have the right of taking its own view of the constitution. This seems to be the case both in France and in Switzerland.

[2] That is, by other courts of the same or a lower degree of authority. A court of the same authority will, however, sometimes differ from a decision it thinks erroneous, and a higher court will not hesitate to do so.

valid it could not have been, because Parliament is omnipotent, and Parliament is omnipotent because Parliament is deemed to be the people. Parliament is not a body with delegated or limited authority. The whole fulness of popular power dwells in it. The whole nation is supposed to be present within its walls.[1] Its will is law; or, as Dante says in a famous line, "its will is power."

There is a story told of an intelligent Englishman who, having heard that the Supreme Federal Court was created to protect the Constitution, and had authority given it to annul bad laws, spent two days in hunting up and down the Federal Constitution for the provisions he had been told to admire. No wonder he did not find them, for there is not a word in the Constitution on the subject. The powers of the Federal courts are the same as those of all other courts in civilized countries, or rather they differ from those of other courts by defect and not by excess, being limited to certain classes of cases. The so-called "power of annulling an unconstitutional statute" is a duty rather than a power, and a duty incumbent on the humblest State court when a case raising the point comes before it no less than on the Supreme Federal Court at Washington. When therefore people talk, as they

[1] The old writers say that the reason why an Act of Parliament requires no public notification in the country is because it is deemed to be made by the whole nation, so that every person is present at the making of it. It is certainly true that the orthodox legal view of Parliament never regards it as exercising powers that can in any sense be called delegated. A remarkable example of the power which Parliament can exert as an ultimately and completely sovereign body is afforded by the Septennial Act (1 Geo. I. st. 2, cap. 38). By this statute a Parliament in which the House of Commons had been elected for three years only, under the Triennial Act then in force, prolonged not only the possible duration of future Parliaments but its own term to seven years, taking to itself four years of power which the electors had not given it.

sometimes do, even in the United States, of the Supreme court as "the guardian of the Constitution," they mean nothing more than that it is the final court of appeal, before which suits involving constitutional questions may be brought up by the parties for decision. In so far the phrase is legitimate. But the functions of the Supreme court are the same in kind as those of all other courts, State as well as Federal. Its duty and theirs is simply to declare and apply the law; and where any court, be it a State court of first instance, or the Federal court of last instance, finds a law of lower authority clashing with a law of higher authority, it must reject the former, as being really no law, and enforce the latter.

It is therefore no mere technicality to point out that the American judges do not, as Europeans are apt to say, "control the legislature," but simply interpret the law. The word "control" is misleading, because it implies that the person or body of whom it is used possesses and exerts discretionary personal Will. Now the American judges have no will in the matter any more than has an English court when it interprets an Act of Parliament. The will that prevails is the will of the people, expressed in the Constitution which they have enacted. All that the judges have to do is to discover from the enactments before them what the will of the people is, and apply that will to the facts of a given case. The more general or ambiguous the language which the people have used, so much the more difficult is the task of interpretation, so much greater the need for ability and integrity in the judges. But the task is always the same in its nature. The judges have no concern with the motives or the results of an enactment, otherwise than as these may throw light

on the sense in which the enacting authority intended it. It would be a breach of duty for them to express, I might almost say a breach of duty to entertain, an opinion on its policy except so far as its policy explains its meaning. They may think a statute excellent in purpose and working, but if they cannot find in the Constitution a power for Congress to pass it, they must brush it aside as invalid. They may deem another statute pernicious, but if it is within the powers of Congress, they must enforce it. To construe the law, that is, to elucidate the will of the people as supreme lawgiver, is the beginning and end of their duty.[1]

To press this point is not to minimize the importance of the functions exercised by the judiciary of the United States, but to indicate their true nature. The importance of those functions can hardly be exaggerated. It arises from two facts. One is that as the Constitution cannot easily be changed, a bad decision on its meaning, *i.e.* a decision which the general opinion of the profession condemns, may go uncorrected. In England, if a court has construed a statute in a way unintended or unexpected, Parliament sets things right next session by amending the statute, and so prevents future decisions to the same effect. But American history shows only one instance in which an unwelcome decision on the meaning of the Constitution has been thus dealt with, viz. the decision, that a State could be sued by a private

[1] "Suppose, however," some one may say, "that the court should go beyond its duty and import its own views of what ought to be the law into its decision as to what is the law. This would be an exercise of judicial will." Doubtless it would, but it would be a breach of duty, would expose the court to the distrust of the people, and might, if repeated or persisted in in a serious matter, provoke resistance to the law as laid down by the court. See Chapter XXXIII. *post.*

citizen,[1] which led to the eleventh amendment, whereby it was declared that the Constitution should not cover a case which the court had held it did cover.

The other fact which makes the function of an American judge so momentous is the brevity, the laudable brevity, of the Constitution. The words of that instrument are general, laying down a few large principles. The cases which will arise as to the construction of these general words cannot be foreseen till they arise. When they do arise the generality of the words leaves open to the interpreting judges a far wider field than is afforded by ordinary statutes which, since they treat of one particular subject, contain enactments comparatively minute and precise. Hence, although the duty of a court is only to interpret, the considerations affecting interpretation are more numerous than in the case of ordinary statutes, more delicate, larger in their reach and scope. They sometimes need the exercise not merely of legal acumen and judicial fairness, but of a comprehension of the nature and methods of government which one does not demand from the European judge who walks in the narrow path traced for him by ordinary statutes. It is therefore hardly an exaggeration to say that the American Constitution as it now stands, with the mass of fringing decisions which explain it, is a far more complete and finished instrument than it was when it came fire-new from the hands of the Convention. It is not merely their work but the work of the judges, and most of all of one man, the great Chief-Justice Marshall.

The march of democracy in England has disposed

[1] See above, p. 315. The doctrine of the Dred Scott case (of which more anon) was set aside by the fourteenth amendment, but that amendment was intended to effect much more than merely to correct the court.

English writers and politicians of the very school which thirty or twenty years ago pointed to America as a terrible example, now to discover that her republic possesses elements of stability wanting in the monarchy of the mother country. They lament that England should have no supreme court. Some have even suggested that England should create one. They do not seem to perceive that the dangers they discern arise not from the want of a court but from the omnipotence of the British Parliament. They ask for a court to guard the British Constitution, forgetting that Britain has no constitution, in the American sense, and never had one, except for a short space under Oliver Cromwell. The strongest court that might be set up in England could effect nothing so long as Parliament retains its power to change every part of the law, including all the rules and doctrines that are called constitutional. If Parliament were to lose that power there would be no need to create a supreme court, because the existing judges of the land would necessarily discharge the very functions which American judges now discharge. If Parliament were to be split up into four parliaments for England, Scotland, Ireland, and Wales, and a new Federal Assembly were to be established with limited legislative powers, powers defined by an instrument which neither the Federal Assembly nor any of the four parliaments could alter, questions would forthwith arise as to the compatibility both of acts passed by the Assembly with the provisions of the instrument, and of acts passed by any of the four parliaments with those passed by the Assembly. These questions would come before the courts and be determined by them like any other question of law. The same thing would happen if Britain were to enter into a federal pact with

her colonies, creating an imperial Council, and giving it powers which, though restricted by the pact to certain purposes, transcended those of the British Parliament. The interpretation of the pact would belong to the courts, and both Parliament and the supposed Council would be bound by that interpretation.[1] If a new supreme court were created by Britain, it would be created not because there do not already exist courts capable of entertaining all the questions that could arise, but because the parties to the new constitution enacted for the United Kingdom, or the British Empire (as the case might be), might insist that a tribunal composed of persons chosen by some Federal authority would be more certainly impartial. The preliminary therefore to any such "judicial safeguard" as has been suggested is the extinction of the present British Parliament and the erection of a wholly different body or bodies in its room.

These observations may suffice to show that there is nothing strange or mysterious about the relation of the Federal courts to the Constitution. The plan which the Convention of 1787 adopted is simple useful and conformable to general legal principles. It is, in the original sense of the word, an elegant plan. But it is not novel. It was at work in the States before the Convention of 1787 met. It was at work in the thirteen colonies before they revolted from England. It is an application of old and familiar legal doctrines. Such novelty as there is belongs to the scheme of a Supreme or Rigid constitution, reserving the ultimate power to the people, and limiting in the same measure the power of a legislature.[2]

It is nevertheless true that there is no part of the

[1] Assuming of course that the power of altering the pact was reserved to some authority superior to either the Council or Parliament.

[2] This was clearly stated by James Wilson of Pennsylvania, one

American system which reflects more credit on its authors or has worked better in practice. It has had the advantage of relegating questions not only intricate and delicate, but peculiarly liable to excite political passions, to the cool, dry atmosphere of judicial determination. The relations of the central Federal power to the States, and the amount of authority which Congress and the President are respectively entitled to exercise, have been the most permanently grave questions in American history, with which nearly every other political problem has become entangled. If they had been left to be settled by Congress, itself an interested party, or by any dealings between Congress and the State legislatures, the dangers of a conflict would have been extreme, and instead of one civil war there might have been several. But the universal respect felt for the Constitution, a respect which grows the longer it stands, has disposed men to defer to any decision which seems honestly and logically to unfold the meaning of its terms. In obeying such a decision they are obeying, not the judges, but the people who enacted the Constitution. To have foreseen that the power of interpreting the Federal Constitution and statutes, and of determining whether or no State constitutions and statutes transgress Federal provisions,

of the deepest thinkers and most exact reasoners among the members of the Convention of 1787. Speaking of the State constitutions, he remarked in the Pennsylvania Convention of 1788: "Perhaps some politician who has not considered with sufficient accuracy our political systems would observe that in our governments the supreme power was vested in the constitutions. This opinion approaches the truth, but does not reach it. The truth is that in our governments the supreme, absolute, and uncontrollable power *remains* in the people. As our constitutions are superior to our legislatures, so the people are superior to our constitutions."—Elliot's *Debates*, ii. 432.

Mr. M'Kean, speaking in the same convention, quoted Locke's *Civil Government* (c. 2, § 140, and c. 13, § 152) as an authority for the proposition that the powers of Congress could be no greater than the positive grant might convey.

would be sufficient to prevent struggles between the National government and the State governments, required great insight and great faith in the soundness and power of a principle. While the Constitution was being framed the suggestion was made, and for a time seemed likely to be adopted, that a veto on the acts of State legislatures should be conferred upon the Federal Congress. Discussion revealed the objections to such a plan. Its introduction would have offended the sentiment of the States, always jealous of their autonomy; its exercise would have provoked collisions with them. The disallowance of a State statute, even if it did really offend against the Federal Constitution, would have seemed a political move, to be resented by a political counter-move. And the veto would often have been pronounced before it could have been ascertained exactly how the State statute would work, sometimes, perhaps, pronounced in cases where the statute was neither pernicious in itself nor opposed to the Federal Constitution. But by the action of the courts the self-love of the States is not wounded, and the decision annulling their laws is nothing but a tribute to the superior authority of that supreme enactment to which they were themselves parties, and which they may themselves desire to see enforced against another State on some not remote occasion. However, the idea of a veto by Congress was most effectively demolished in the Convention by Roger Sherman, who acutely remarked that a veto would seem to recognize as valid the State statute objected to, whereas if inconsistent with the Constitution it was really invalid already and needed no veto.

By leaving constitutional questions to be settled by the courts of law another advantage was incidentally secured. The court does not go to meet the question; it

waits for the question to come to it. When the court acts it acts at the instance of a party. Sometimes the plaintiff or the defendant may be the National government or a State government, but far more frequently both are private persons, seeking to enforce or defend their private rights. For instance, in the famous case[1] which established the doctrine that a statute passed by a State repealing a grant of land to an individual made on certain terms by a previous statute is a law "impairing the obligation of a contract," and therefore invalid, under Art. i. § 10 of the Federal Constitution; the question came before the court on an action by one Fletcher against one Peck on a covenant contained in a deed made by the latter; and to do justice between plaintiff and defendant it was necessary to examine the validity of a statute passed by the legislature of Georgia. This method has the merit of not hurrying a question on, but leaving it to arise of itself. Full legal argument on both sides is secured by the private interests which the parties have in setting forth their contentions; and the decision when pronounced, since it appears to be, as in fact it is, primarily a decision upon private rights, obtains that respect and moral support which a private plaintiff or defendant establishing his legal right is entitled to from law-abiding citizens. A State might be provoked to resistance if it saw, as soon as it had passed a statute, the Federal government inviting the Supreme court to declare that statute invalid. But when the Federal authority stands silent, and a year after in an ordinary action between Smith and Jones the court decides in favour of Jones, who argued that the statute on which the plaintiff relied was invalid because it transgressed some provision of the Constitution, every-

[1] *Fletcher* v. *Peck*, 6 Cranch, p. 87.

body feels that Jones was justified in so arguing, and that since judgment was given in his favour he must be allowed to retain the money which the court has found to be his, and the statute which violated his private right must fall to the ground.

This feature has particularly excited the admiration of Continental critics. To an Englishman it seems perfectly natural, because it is exactly in this way that much of English constitutional law has been built up. The English courts had indeed no rigid documentary constitution by which to test the ordinances or the executive acts of the Crown, and their decisions on constitutional points have often been pronounced in proceedings to which the Crown or its ministers were parties. But they have repeatedly established principles of the greatest moment by judgments delivered in cases where a private interest was involved, grounding themselves either on a statute which they interpreted or on some earlier decision.[1] Lord Mansfield's famous declaration that slavery was legally impossible in England was pronounced in such a private case. *Stockdale* v. *Hansard*, in which the law regarding the publishing of debates in Parliament was settled, was an action by a private person against printers. The American method of settling constitutional questions, like all other legal questions, in actions between private parties, is therefore no new device, but a part of that priceless heritage of the English Common Law which the colonists carried with them across the sea, and which they have preserved and developed in a manner worthy of its own free spirit and lofty traditions.

Europeans commonly suppose that the functions

[1] The independence (since the Revolution) of the English judges and of the American Federal judges has of course largely contributed to make them trusted, and to make them act worthily of the trust reposed in them.

above described as pertaining to the American courts are peculiar to and essential to a Federal government. This is a mistake. They are not peculiar to a federation, because the distinction of fundamental laws and inferior laws may exist equally well in a unified government, did exist in each of the thirteen colonies up till 1776, did exist in each of the thirteen States from 1776 till 1789, does exist in every one of the thirty-eight States now. Nor are they essential, because a federation may be imagined in which the central or national legislature should be theoretically sovereign in the same sense and to the same full extent as is the British Parliament.[1] The component parts of any confederacy will no doubt be generally disposed to place their respective State rights under the protection of a compact unchangeable by the national legislature. But they need not do so, for they may rely on the command which as electors they have over that legislature, and may prefer the greater energy which a sovereign legislature promises to the greater security for State rights which a limited legislature implies. In the particular case of America it is abundantly clear that if there had been in 1787 no States jealous of their powers, but an united nation creating for itself an improved frame of government, the organs of that government would have been limited by a fundamental law just as they are now, because the nation, fearing and distrusting the agents it was creating, was resolved to fetter them by reserving to itself the ultimate and over-riding sovereignty.

[1] It would appear that in the Achæan League the Assembly (which voted by cities) was sovereign, and could by its vote vary the terms of the federal arrangements between the cities forming the federation; although the scantiness of our data and what may be called the want of legal-mindedness among the Greeks make this and similar questions not easy of determination.

The case of Switzerland shows that the American plan is not the only one possible to a federation. The Swiss Federal Court, while instituted in imitation of the American, is not the only authority competent to determine whether a Cantonal law is void because inconsistent with the Federal Constitution, for in some cases recourse must be had not to the Court but to the Federal Council, which is a sort of executive cabinet of the Confederation. And the Federal Court is bound to enforce every law passed by the Federal legislature, even if it violate the Constitution. In other words, the Swiss Constitution has reserved some points of Cantonal law for an authority not judicial but political, and has made the Federal legislature the sole judge of its own powers, the authorized interpreter of the Constitution, and an interpreter not likely to proceed on purely legal grounds.[1] To an English or American lawyer the Swiss copy seems neither so consistent with sound theory nor so safe in practice as the American original. But the statesmen of Switzerland felt that a method fit for America might be ill-fitted for their own country, where the latitude given to the executive is greater; and the Swiss habit of constantly recurring to popular vote makes it less necessary to restrain the legislature by a permanently enacted instrument. The political traditions of the European continent differ widely from those of England and America; and the Federal Judicature is not the only Anglo-American institution which might fail to thrive anywhere but in its native soil.

[1] See upon this fascinating subject, the provisions of the Swiss Federal Constitution of 1874, arts. 102, 110, and 114; also Dubs, *Das oeffentliche Recht der Schweizerischen Eidgenossenschaft*, and a valuable pamphlet by M. Ch. Soldan, entitled *Du recours de Droit Public au Tribunal Fédéral;* Bâle, 1886. Dr. Dubs was himself the author of the plan whereby the Federal legislature is made the arbiter of its own constitutional powers.

CHAPTER XXIV

THE WORKING OF THE COURTS

THOSE readers who have followed thus far the account given of the Federal courts have probably asked themselves how judicial authorities can sustain the functions which America requires them to discharge. It is plain that judges, when sucked into the vortex of politics, must lose dignity, impartiality, and influence. But how can judges keep out of politics, when political issues raising party passions come before them? Must not constitutional questions, questions as to the rights under the Constitution of the Federal government against the States, and of the branches of the Federal government against one another, frequently involve momentous political issues? In the troublous times during which the outlines of the English Constitution were settled, controversy often raged round the courts, because the decision of contested points lay in their hands. When Charles I. could not induce Parliament to admit the right of levying contributions which he claimed, and Parliament relied on the power of the purse as its defence against Charles I., the question whether ship-money could lawfully be levied was vital to both parties, and the judges held the balance of power in their hands. At that moment

the law could not be changed, because the Houses and the king stood opposed: hence everything turned on the interpretation of the existing law. In America the Constitution is at all times very hard to change: much more then must political issues turn on its interpretation. And if this be so, must not the interpreting court be led to assume a control over the executive and legislative branches of the government, since it has the power of declaring their acts illegal?

There is ground for these criticisms. The evil they point to has occurred and may recur. But it occurs very rarely, and may be averted by the same prudence which the courts have hitherto generally shown. The causes which have enabled the Federal courts to avoid it, and to maintain their dignity and influence almost unshaken, are the following :—

The Supreme court—I speak of the Supreme court because its conduct has governed that of inferior Federal courts—has steadily refused to interfere in purely political questions. Whenever it finds any discretion given to the President, any executive duty imposed on him, it considers the manner in which he exercises his discretion and discharges the duty to be beyond its province. Whenever the Constitution has conferred a power of legislating upon Congress, the court declines to inquire whether the use of the power was in the case of a particular statute passed by Congress either necessary or desirable, or whether it was exerted in a prudent manner, for it holds all such matters to be within the exclusive province of Congress.

"In measures exclusively of a political, legislative, or executive character, it is plain that as the supreme authority as to these questions belongs to the legislative and executive departments, they cannot be re-examined elsewhere. Thus Congress, having the

power to declare war, to levy taxes, to appropriate money, to regulate intercourse and commerce with foreign nations, their mode of executing these powers can never become the subject of re-examination in any other tribunal. So the power to make treaties being confided to the President and Senate, when a treaty is properly ratified, it becomes the law of the land, and no other tribunal can gainsay its stipulations. Yet cases may readily be imagined in which a tax may be laid, or a treaty made upon motives and grounds wholly beside the intention of the Constitution. The remedy, however, in such cases is solely by an appeal to the people at the elections, or by the salutary power of amendment provided by the Constitution itself." [1]

This may seem a vague statement of the principle which the court has followed, but it could be rendered more precise only by setting forth the instances in which it has been applied. It has enabled the court to avoid an immixture in political strife which must have destroyed its credit, has deterred it from entering the political arena, where it would have been weak, and enabled it to act without fear in the sphere of pure law, where it is strong. Occasionally, however, as I shall explain presently, the court has come into collision with the executive. Occasionally it has been required to give decisions which have worked with tremendous force on politics. The most famous of these was the Dred Scott case,[2] in which the Supreme court, on an action by a negro for assault and battery against the person claiming to be his master, declared that a slave taken temporarily to a free State and to a Territory in which Congress had forbidden slavery, and afterwards returning into a slave State and resuming residence there, was

[1] Story, *Commentaries on the Constitution*, § 374.

[2] *Scott* v. *Sandford*, 19 How. 393. There is an immense literature about this case, the legal points involved in which are too numerous and technical to be here stated. It is noticeable that the sting of the decision lay rather in the *obiter dicta* than in the determination of the main question involved.

not a citizen capable of suing in the Federal courts if by the law of the slave State he was still a slave. This was the point which actually called for decision; but the majority of the court, for there was a dissentient minority, went further, and delivered a variety of *dicta* on various other points touching the legal status of negroes and the constitutional view of slavery. This judgment, since the language used in it seemed to cut off the hope of a settlement by the authority of Congress of the then (1857) pending disputes over slavery and its extension, did much to precipitate the Civil War.

Some questions, and among them many which involve political issues, can never come before the Federal courts, because they are not such as are raisable in an action between parties. Of those which might be raised, some never happen to arise, while others do not present themselves in an action till some time after the statute has been passed or act done on which the court is called to pronounce. By that time it may happen that the warmth of feeling which expressed itself during debate in Congress or in the country has passed away, while the judgment of the nation at large has been practically pronounced upon the issue.

Looking upon itself as a pure organ of the law, commissioned to do justice between man and man, but to do nothing more, the Supreme court has steadily refused to decide abstract questions, or to give opinions in advance by way of advice to the executive. When, in 1793, President Washington requested its opinion on the construction of the treaty of 1778 with France, the judges declined to comply.[1]

This restriction of the court's duty to the determina-

[1] Story, *Commentaries*, § 1571; cf. Marshall's *Life of Washington*, vol. v. chap. vi.

tion of concrete cases arising in suits has excited so much admiration from De Tocqueville and other writers, that the corresponding disadvantages must be stated. They are these :—

To settle at once and for ever a disputed point of constitutional law would often be a gain both to private citizens and to the organs of the government. Under the present system there is no certainty when, if ever, such a point will be settled. Nobody may care to incur the trouble and expense of taking it before the court. A suit which raises it may be compromised or dropped.

When such a question, after perhaps the lapse of years, comes before the Supreme court and is determined, the determination may be different from what the legal profession has expected, may alter that which has been believed to be the law, may shake or overthrow private interests based upon views now declared to be erroneous.[1] These are, no doubt, drawbacks incident to every system in which the decisions of courts play a great part. There are many points in the law of England which are uncertain even now, because they have never come before a court of high authority, or, having been decided in different ways by co-ordinate courts, have not been carried to the final court of appeal.[2] But in England, if the inconvenience is great, it can be removed by an Act of Parliament, and it can hardly be so great as it may be in America, where, since the doubtful point may be the true construction of the funda-

[1] The Dred Scott decision in 1857 declared the Missouri compromise, carried out by Act of Congress in 1820, to have been beyond the powers of Congress, which, to be sure, had virtually repealed it a year or two before by the Kansas-Nebraska legislation. Decisions have been given on the fourteenth and fifteenth amendments upsetting or qualifying congressional legislation passed years before.

[2] The point at last settled in *Martin* v. *Holgate* by the House of Lords will occur to English lawyers as a remarkable instance.

mental law of the Union, the President and Congress may be left in uncertainty as to how they shall shape their course. With the best wish in the world to act conformably to the Constitution, these authorities have no means of ascertaining before they act what, in the view of its authorized interpreters, the true meaning of the Constitution is. Moved by this consideration, five States of the Union have by their constitutions empowered the governor or legislature to require the written opinions of the judges of the highest State court on points submitted to them.[1] But the President of the United States can only consult his attorney-general,[2] and the Houses of Congress have no legal adviser, though to be sure they are apt to receive a profusion of advice from their own legal members.

I return to notice other causes which have sustained the authority of the court by saving it from immersion in the turbid pool of politics. These are the strength of professional feeling among American lawyers, the relation of the bench to the bar, the power of the legal profession in the country. Proposing to describe both bar and bench in subsequent chapters, I will only now remark that the keen interest which the profession takes in the law secures an unusually large number of acute and competent critics of the interpretation put upon the law by the judges. Such men

[1] See Chapter XXXVII. in Vol. II. There exists a similar provision in the statutes creating some of the British colonial governments, and the Government of Ireland Bill, introduced into the House of Commons in 1886 but defeated there, contained (§ 25) a proviso enabling the Lord-Lieutenant of Ireland or a Secretary of State to refer a question for opinion to the judicial committee of the Privy Council.

[2] The President sometimes, for the benefit of the public, publishes the written opinion of the attorney-general on an important and doubtful point; but such an opinion has no more authority than what it may derive from the professional eminence of the person who gives it.

form a tribunal to whose opinion the judges are sensitive, and all the more sensitive because the judges, like those of England, but unlike those of continental Europe, have been themselves practising counsel. The better lawyers of the United States do not sink their professional sentiment and opinion in their party sympathies. They know good law even when it goes against themselves, and privately condemn as bad law a decision none the less because it benefits their party or their client. The Federal judge who has recently quitted the ranks of the bar remains in sympathy with it, respects its views, desires its approbation. Both his inbred professional habits, and his respect for those traditions which the bar prizes, restrain him from prostituting his office to party objects. Though he has usually been a politician, and owes his promotion to his party, his political trappings drop off him when he mounts the Supreme bench. He has now nothing to fear from party displeasure, because he is irremovable (except by impeachment), nothing to hope from party favour, because he is at the top of the tree and can climb no higher. Virtue has all the external conditions in her favour. It is true that virtue is compatible with the desire to extend the power and jurisdiction of the court. But even allowing that this motive may occasionally sway the judicial mind, the circumstances which surround the action of a tribunal debarred from initiative, capable of dealing only with concrete cases that come before it at irregular intervals, unable to appropriate any of the sweets of power other than power itself, make a course of systematic usurpation more difficult and less seductive than it would be to a legislative assembly or an executive council. As the respect of the bench for the bar tends to keep the judges in the straight path, so

the respect and regard of the bar for the bench, a regard grounded on the sense of professional brotherhood, ensure the moral influence of the court in the country. The bar has usually been very powerful in America, not only as being the only class of educated men who are at once men of affairs and skilled speakers, but also because there has been no nobility or territorial aristocracy to overshadow it.[1] Politics have been largely in its hands, and must remain so as long as political questions continue to be involved with the interpretation of constitutions. For the first sixty or seventy years of the Republic the leading statesmen were lawyers, and the lawyers as a whole moulded and led the public opinion of the country. Now to the better class of American lawyers law was a sacred science, and the highest court which dispensed it a sort of Mecca, towards which the faces of the faithful turned. Hence every constitutional case before the Supreme court was closely watched, the reasonings of the court studied, and its decisions appreciated as law apart from their bearing on political doctrines. I have heard elderly men describe the interest with which, in their youth, a famous advocate who had gone to Washington to argue a case before the Supreme court was welcomed by the bar of his own city on his return, how the rising men crowded round him to hear what he had to tell of the combat in that arena where the best intellects of the nation strove, how the respect which he never failed to express for the ability and impartiality of the court communicated itself to them, how admiration bred acquies-

[1] This professional interest in law seems to have been stronger in the last generation than it is now; it is even now stronger in America than in England. Of course I do not speak of those sharpshooters who, while calling themselves lawyers, are really politicians or lobbyists, but of the regular army of practitioners.

cence, and the whole profession accepted expositions of the law unexpected by many, perhaps unwelcome to most. When it was felt that the judges had honestly sought to expound the Constitution, and when the cogency of their reasonings was admitted, resentment, if any there had been, passed away, and the support which the bar gave to the court ensured the obedience of the people.

That this factor in the maintenance of judicial influence proved so potent was largely due to the personal eminence of the judges. One must not call that a result of fortune which was the result of the wisdom of successive Presidents in choosing capable men to sit on the supreme Federal bench. Yet one man was so singularly fitted for the office of chief justice, and rendered such incomparable services in it, that the Americans have been wont to regard him as a special gift of favouring Providence. This was John Marshall, who presided over the Supreme court from 1801 till his death in 1835 at the age of seventy-seven, and whose fame overtops that of all other American judges more than Papinian overtops the jurists of Rome or Lord Mansfield the jurists of England. No other man did half so much either to develop the Constitution by expounding it, or to secure for the judiciary its rightful place in the government as the living voice of the Constitution. No one vindicated more strenuously the duty of the court to establish the authority of the fundamental law of the land, no one abstained more scrupulously from trespassing on the field of executive administration or political controversy. The admiration and respect which he and his colleagues won for the court remain its bulwark: the traditions which were formed under him and them have continued in general to guide the action and elevate the sentiments of their successors.

Nevertheless, the court has not always had smooth seas to navigate. It has more than once been shaken by blasts of unpopularity. It has not infrequently found itself in conflict with other authorities.

The first attacks arose out of its decision that it had jurisdiction to entertain suits by private persons against a State.[1] This point was set at rest by the eleventh amendment; but the States then first learnt to fear the Supreme court as an antagonist. In 1801, in an application requiring the secretary of state to deliver a commission, it declared itself to have the power to compel an executive officer to fulfil a ministerial duty affecting the rights of individuals.[2] President Jefferson protested angrily against this claim, but it has been repeatedly re-asserted, and is now undoubted law. It was in this same case that the court first explicitly asserted its duty to treat as invalid an Act of Congress inconsistent with the Constitution.[3] In 1806 it for the first time pronounced a State statute void; in 1816 and 1821 it rendered decisions establishing its authority as a supreme court of appeal from State courts on "federal questions," and unfolding the full meaning of the doctrine that the Constitution and Acts of Congress duly made in pursuance of the Constitution are the fundamental and supreme law of the land. This was a doctrine which had not been adequately apprehended even by lawyers, and its development, legitimate as we now

[1] *Chisholm* v. *Georgia*, see above, p. 315.

[2] *Marbury* v. *Madison*, 1 Cranch, 137. In this case the court refused to issue the mandamus asked for, but upon the ground that the statute of Congress giving to the Supreme court original jurisdiction to issue a mandamus was inconsistent with the Constitution. See also *Kendal* v. *United States*, 12 Peters, 616; *United States* v. *Schurz*, 102 U.S. 378.

[3] This however is a power which it has rarely been found necessary to exert. See Dr. Andrews' *Manual of the Constitution*, p. 196.

deem it, roused opposition. The Democratic party which came into power under President Jackson in 1829, was specially hostile to a construction of the Constitution which seemed to trench upon State rights,[1] and when in 1832 the Supreme court ordered the State of Georgia to release persons imprisoned under a Georgian statute which the court declared to be invalid,[2] Jackson, whose duty it was to enforce the decision by the executive arm, remarked, "John Marshall has pronounced his judgment: let him enforce it if he can." The successful resistance of Georgia in the Cherokee dispute[3] gave a blow to the authority of the court, and marked the beginning of a new period in its history, during which, in the hands of judges mostly appointed by the Democratic party, it made no further advance in power.

In 1857 the Dred Scott judgment, pronounced by a majority of the judges, excited the strongest outbreak of displeasure yet witnessed. The Republican party, then rising into strength, denounced this decision in the resolutions of the convention which nominated Abraham Lincoln in 1860, and its doctrine as to citizenship was expressly negatived in the fourteenth constitutional amendment adopted after the War of Secession.

It was feared that the political leanings of the judges

[1] Martin van Buren (President 1837-41) expressed the feelings of the bulk of his party when he complained bitterly of the encroachments of the Supreme court, and declared that it would never have been created had the people foreseen the powers it would acquire.

[2] This was only one act in the long struggle of the Cherokee Indians against the oppressive conduct of Georgia, conduct which the court emphatically condemned, though it proved powerless to help the unhappy Cherokees.

[3] The matter did not come to an absolute conflict, because before the time arrived for the court to direct the United States marshal of the district of Georgia to summon the *posse comitatus* and the President to render assistance in liberating the prisoners, the prisoners submitted to the State authorities, and were thereupon released. They probably believed that the imperious Jackson would persist in his hostility to the Supreme court.

who formed the court at the outbreak of the war would induce them to throw legal difficulties in the prosecution of the measures needed for re-establishing the authority of the Union. These fears proved ungrounded, although some contests arose as to the right of officers in the Federal army to disregard writs of habeas corpus issued by the court.[1] In 1868, having then become Republican in its sympathies by the appointment of new members as the older judges disappeared, it sustained the congressional plan of reconstruction which President Johnson was endeavouring to defeat, and in subsequent cases it has given effect to most, though not to all, of the statutes passed by Congress under the three amendments which abolished slavery and secured the rights of the negroes. In 1876 it refused to entertain proceedings instituted for the purpose of forbidding the President to execute the Reconstruction Acts.

Two of its later acts are thought by some to have affected public confidence. One of these was the reversal, first in 1871, and again, upon broader but not inconsistent grounds, in 1884, of the decision, given in 1869, which declared invalid the Act of Congress making government paper a legal tender for debts. The original decision of 1869 was rendered by a majority of five to three. The court was afterwards changed by the creation of an additional judgeship, and by the appointment of a new member to fill a vacancy which occurred after the settlement, though before the delivery, of the first decision. Then the question was brought up again in a new case between different parties, and decided in the opposite sense (*i.e.* in favour of the

[1] See as to these the article "Habeas Corpus" by Mr. Alex. Johnston in the *American Cyclopædia of Political Science*. And consider the very important decision in *Ex parte Milligan*, 4 Wall. 129.

power of Congress to pass legal tender acts) by a majority of five to four. Finally, in 1884, another suit having brought up a point practically the same though under a later statute passed by Congress, the court determined with only one dissentient voice that the power existed.[1] This last decision excited some criticism, especially among the more conservative lawyers, because it seemed to remove restrictions hitherto supposed to exist on the authority of Congress, recognizing the right to establish a forced paper currency as an attribute of the sovereignty of the national government. But be the decision right or wrong, a point on which high authorities are still divided,[2] the reversal by the highest court in the land of its own previous decision may have tended to unsettle men's reliance on the stability of the law, while the manner of the earlier reversal, following as it did on the creation of a new judgeship and the appointment of two justices, both known to be in favour of the view which the majority of the court had just disapproved, disclosed a weak point in the constitution of the tribunal which may some day prove fatal to its usefulness.

The other misfortune was the interposition of the court in the presidential electoral count dispute of 1877.[3] Most people now admit that Mr. Tilden and not Mr. Hayes ought to have been declared elected in that year. But the five justices of the Supreme court who were included in the electoral commission then appointed

[1] The earlier decision in favour of the power deduced it from war powers, the later from the general sovereignty of the national government. See *Hepburn* v. *Griswold*, 8 Wall. 603 ; *Legal Tender Cases*, 12 Wall. 457 ; *Juilliard* v. *Greenman*, 110 U.S. 421.

[2] See the pamphlets of Mr. George Bancroft and Mr. R. C. MacMurtrie, an article in the *Amer. Law Review*, iv. 768, by Mr. (Justice) O. W. Holmes, and an article in the *Harvard Law Review* for May 1887, by Mr. James B. Thayer, of the Harvard Law School.

[3] See above, p. 60.

voted on party lines no less steadily than did the senators and representatives who sat on it. A function scarcely judicial, and certainly not contemplated by the Constitution, was then for the first time thrown upon the judiciary, and in discharging it the judiciary acted exactly like non-judicial persons.

Notwithstanding this occurrence, which after all was quite exceptional, the credit and dignity of the Supreme court stand very high. No one of its members has ever been suspected of corruption, and comparatively few have allowed their political sympathies to disturb their official judgment. Though for many years back every President has appointed only men of his own party, and frequently leading politicians of his own party,[1] the new-made judge has left partisanship behind him, while no doubt usually retaining that bias or tendency of his mind which party training produces. At present all the judges but three belong to the Republican party, but although the Democrats regret this, and when they came into power welcomed the prospect of putting in their own men as vacancies occur, the circumstance does not affect their respect for the court and their faith in its uprightness. The desire for an equal representation of both parties is based, not on any fear that suitors will suffer from the influence of party spirit, but on the feeling that when any new constitutional question arises it is right that the tendencies which have characterized the Democratic view

[1] I have heard American lawyers express surprise as well as admiration at the occasional departures in England (as notably in the recent case of Lord Justice Holker, who, having been Attorney-General of one party, was, in respect of his eminent merits, appointed Lord Justice of Appeal by the other) from the practice of political appointments to judicial office. Such non-political appointments are however occasionally made in the several States by the governors, or even (as in the case of Chief-Justice Redfield of Vermont) by the legislature.

of the Constitution should be duly represented over against those supposed to influence the Republicans.

Apart from these constitutional questions, the value of the Federal courts to the country at large has been inestimable. They have done much to meet the evils which an elective and ill-paid State judiciary inflicts on some of the newer and a few even of the older States. The Federal Circuit and District judges, small as are their salaries, are in most States individually superior men to the State judges, because the greater security of tenure induces abler men to accept the post. Being irremovable, they feel themselves independent of parties and politicians, whom the elected State judge, holding for a limited term, may be tempted to conciliate with a view to re-election. Plaintiffs therefore, when they have a choice of suing in a State court or a Federal court, frequently prefer the latter; and the litigant who belongs to a foreign country, or to a different State from that in which his opponent resides, may think his prospects of an unbiassed decision better before it than before a State tribunal.

Federal judgeships of the second and third rank (Circuit and District) are invariably given to the members of the President's party, and by an equally well-established usage, to persons resident in the State or States where the circuit or district court is held. But cases of corruption, or even of pronounced partisanship, are practically unknown. The chief present defect is the inadequacy of the salaries of the District judges, and the insufficiency of the staff in the more populous Eastern States to grapple with the vast and increasing business which flows in upon them. So too, in the Supreme court, arrears have so accumulated that it is now more than three years from the time when a cause is entered before

it can come on for hearing. Some have proposed to meet this evil by limiting the right of appeal to cases involving a considerable sum of money; but a better remedy would be to divide the Supreme court into two divisional courts for the hearing of ordinary suits, reserving for the full court points affecting the construction of the Constitution.

One question remains to be put and answered.

The Supreme court is the living voice of the Constitution,[1] that is, of the will of the people expressed in the fundamental law they have enacted. It is, therefore, as some one has said, the conscience of the people, who have resolved to restrain themselves from hasty or unjust action by placing their representatives under the restriction of a permanent law. It is the guarantee of the minority, who, when threatened by the impatient vehemence of a majority, can appeal to this permanent law, finding the interpreter and enforcer thereof in a court set high above the assaults of faction.

To discharge these momentous functions, the court must be stable even as the Constitution is stable. Its spirit and tone must be that of the people at their best moments. It must resist transitory impulses, and resist them the more firmly the more vehement they are. Entrenched behind impregnable ramparts, it must be able to defy at once the open attacks of the other departments of the government, and the more dangerous, because impalpable, seductions of popular sentiment.

Does it possess, has it displayed, this strength and stability?

[1] The Romans called their chief judicial officer "the living voice of the civil law"; but as this "civil law" consisted largely of custom, he naturally enjoyed a wider discretion in moulding and expanding as well as in expounding the law than do the American judges, who have a formally enacted constitution to guide and restrain them.

It has not always followed its own former decisions. This is natural in a court whose errors cannot be cured by the intervention of the legislature. The English final Court of Appeal always follows its previous decisions, though high authorities have declared that cases may be imagined in which it would refuse to do so. And that court (the House of Lords) can afford so to adhere, because, when an old decision begins to be condemned, Parliament can forthwith alter the law. But as nothing less than a constitutional amendment can alter the law contained in the Federal Constitution, the Supreme court must choose between the evil of unsettling the law by reversing, and the evil of perpetuating bad law by following, a former decision. It may reasonably, in extreme cases, deem the latter evil the greater.

The Supreme court feels the touch of public opinion. Opinion is stronger in America than anywhere else in the world, and judges are only men. To yield a little may be prudent, for the tree that cannot bend to the blast may be broken. There is, moreover, this ground at least for presuming public opinion to be right, that through it the progressive judgment of the world is expressed. Of course, whenever the law is clear, because the words of the Constitution are plain or the cases interpreting them decisive on the point raised, the court must look solely to those words and cases, and cannot permit any other consideration to affect its mind. But when the terms of the Constitution admit of more than one construction, and when previous decisions have left the true construction so far open that the point in question may be deemed new, is a court to be blamed if it prefers the construction which the bulk of the people deem suited to the needs of the

time? A court is sometimes so swayed consciously, more often unconsciously, because the pervasive sympathy of numbers is irresistible even by elderly lawyers. A remarkable example is furnished by the decisions (in 1876) of the Supreme court in the so-called Granger cases, suits involving the power of a State to subject railways and other corporations or persons exercising what are called "public trades" to restrictive legislation without making pecuniary compensation.[1] I do not presume to doubt the correctness of these decisions; but they evidently represent a different view of the sacredness of private rights and of the powers of a legislature from that entertained by Chief-Justice Marshall and his contemporaries. They reveal that current of opinion which now runs strongly in America against what are called monopolies and the powers of incorporated companies.

The Supreme court has changed its colour, *i.e.* its temper and tendencies, from time to time, according to the political proclivities of the men who composed it. It changes very slowly, because the vacancies in a small body happen rarely, and its composition therefore often represents the predominance of a past and not of the presently ruling party. From 1789 down till the death of Chief-Justice Marshall in 1835 its tendency was to the extension of the powers of the Federal government and therewith of its own jurisdiction, because the ruling spirits in it were men who belonged to the old Federalist party, though that party fell in 1800,

[1] See *Munn* v. *Illinois*, and the following cases in 94 U.S. Rep. 193. This was one of those cases in which the court felt bound to regard not only the view which it took itself of the meaning of the Constitution but that which a legislature might reasonably take.—See Chapter XXXIV. *post*. As to the non-liability to make compensation where licences for the sale of intoxicants are forbidden, see *Mugler* v. *Kansas*, decided in the Supreme court of the United States, 5th December 1887.

and disappeared in 1814. From 1835 till the War of Secession its sympathies were with the doctrines of the Democratic party. Without actually abandoning the positions of the previous period, the court, during these years when Chief-Justice Taney presided over it, leant against any further extension of Federal power or of its own jurisdiction. During and after the war, when the ascendency of the Republican party had begun to change the composition of the court, a third period opened. Centralizing ideas were again powerful: the vast war powers asserted by Congress were in most instances supported by judicial decision, the rights of States while maintained (as in the Granger cases) as against private persons or bodies, were for a time regarded with less favour whenever they seemed to conflict with those of the Federal government. In none of these three periods can the judges be charged with any prostitution of their functions to party purposes. Their action flowed naturally from the habits of thought they had formed before their accession to the bench, and from the sympathy they could not but feel with the doctrines on whose behalf they had contended. Even on the proverbially upright and impartial bench of England the same tendencies may be discerned. There are constitutional questions, and questions touching what may be called the policy of the law, which would be decided differently by one English judge or by another, not from any conscious wish to favour a party or a class, but because the views which a man holds as a citizen cannot fail to colour his judgment even on legal points.

The Fathers of the Constitution studied nothing more than to secure the complete independence of the judiciary. The President was not permitted to remove the judges, nor Congress to diminish their salaries. One thing only was either forgotten or deemed undesirable,

because highly inconvenient, to determine,—the number of judges in the Supreme court. Here was a weak point, a joint in the court's armour through which a weapon might some day penetrate. Congress having in 1801, pursuant to a power contained in the Constitution, established sixteen Circuit courts, President Adams, immediately before he quitted office, appointed members of his own party to the justicèships thus created. When President Jefferson came in, he refused to admit the validity of the appointments; and the newly elected Congress, which was in sympathy with him, abolished the Circuit courts themselves, since it could find no other means of ousting the new justices. This method of attack, whose constitutionality has been much doubted, cannot be used against the Supreme court, because that tribunal is directly created by the Constitution. But as the Constitution does not prescribe the number of justices, a statute may increase or diminish the number as Congress thinks fit. In 1866, when Congress was in fierce antagonism to President Johnson, and desired to prevent him from appointing any judges, it reduced the number, which was then ten, by a statute providing that no vacancy should be filled up till the number was reduced to seven. In 1869, when Johnson had been succeeded by Grant, the number was raised to nine, and the legal tender decision given just before was presently reversed by the altered court. This method is plainly susceptible of further and possibly dangerous application. Suppose a Congress and President bent on doing something which the Supreme court deems contrary to the Constitution. They pass a statute. A case arises under it. The court on the hearing of the case unanimously declares the statute to be null, as being beyond

the powers of Congress. Congress forthwith passes and the President signs another statute more than doubling the number of the justices. The President appoints to the new justiceships men who are pledged to hold the former statute constitutional. The Senate confirms his appointments. Another case raising the validity of the disputed statute is brought up to the court. The new justices outvote the old ones: the statute is held valid: the security provided for the protection of the Constitution is gone like a morning mist.

What prevents such assaults on the fundamental law, assaults which, however immoral in substance, would be perfectly legal in form? Not the mechanism of government, for all its checks have been evaded. Not the conscience of the legislature and the President, for heated combatants seldom shrink from justifying the means by the end. Nothing but the fear of the people, whose broad good sense and attachment to the great principles of the Constitution may generally be relied on to condemn such a perversion of its forms. Yet if excitement has risen high over the country, a majority of the people may acquiesce; and then it matters little whether what is really a revolution be accomplished by openly violating or by merely distorting the forms of law. To the people we come sooner or later: it is upon their wisdom and self-restraint that the stability of the most cunningly devised scheme of government will in the last resort depend.

CHAPTER XXV

COMPARISON OF THE AMERICAN AND EUROPEAN SYSTEMS

THE relations to one another of the different branches of the government in the United States are so remarkable and so full of instruction for other countries, that it seems desirable, even at the risk of a little repetition, to show by a comparison with the Cabinet or parliamentary system of European countries how this complex American machinery actually works.

The English system on which have been modelled, of course with many variations, the systems of France, Belgium, Holland, Italy, Germany, Hungary (where, however, the English scheme has been compounded with an ancient and very interesting native-born constitution), Sweden, Norway, Denmark,[1] Spain, and Portugal, as well as the constitutions of the great self-governing English colonies in North America and Australia—this English system places at the head of the state a person in whose name all executive acts are done, and who is (except in France) irresponsible and irremovable.[2] His acts are done by the advice and on the

[1] In Denmark constitutional government seems still to subsist in theory, though for a good many years it has been suspended in practice.

[2] In the British colonies the governor is irremovable by the colony, and irresponsible to its legislature, though responsible to and removable by the home government.

responsibility of ministers chosen nominally by him, but really by the representatives of the people, usually, but not necessarily, from among the members of the legislature. The representatives are, therefore, through the agents whom they select, the true government of the country. When the representative assembly ceases to trust these agents, the latter resign, and a new set are appointed. Thus the executive as well as the legislative power really belongs to the majority of the representative chamber, though in appointing agents, an expedient which its size makes needful, it is forced to leave in the hands of these agents a measure of discretion sufficient to make them appear distinct from it, and sometimes to tempt them to acts which their masters disapprove. As the legislature is thus in a sense executive, so the executive government, the council of ministers or cabinet, is in so far legislative that the initiation of measures rests very largely with them, and the carrying of measures through the Chamber demands their advocacy and counter pressure upon the majority of the representatives. They are not merely executive agents but also legislative leaders. One may say, indeed, that the legislative and executive functions are interwoven as closely under this system as under absolute monarchies, such as Imperial Rome or modern Russia; and the fact that taxation, while effected by means of legislation, is the indispensable engine of administration, shows how inseparable are these two apparently distinct powers.

Under this system the sovereignty of the legislature may be more or less complete. It is most complete in France; least complete in Germany and Prussia, where the power of the Emperor and King is great and not declining. But in all these countries not only are the

legislature and executive in close touch with one another, but they settle their disputes without reference to the judiciary. The courts of law cannot be invoked by the executive against the legislature, because questions involving the validity of a legislative act do not come before it, since the legislature is either completely sovereign, as in England, or the judge of its own competence, as in Belgium. The judiciary, in other words, does not enter into the consideration of the political part of the machinery of government.

This system of so-called cabinet government seems to Europeans now, who observe it at work over a large part of the world, an obvious and simple system. We are apt to forget that it was never seen anywhere till the English developed it by slow degrees, and that it is a very delicate system, depending on habits, traditions, and understandings which are not easily set forth in words, much less transplanted to a new soil.

We are also prone to forget how very recent it is. People commonly date it from the reign of King William the Third; but it worked very irregularly till the Hanoverian kings came to the throne, and even then it at first worked by means of a monstrous system of bribery and place-mongering. In the days of George the Third the personal power of the Crown for a while revived and corruption declined.[1] The executive head

[1] Corruption was possible, because the House of Commons did not look for support to the nation, its debates were scantily reported, it had little sense of responsibility. An active king was therefore able to assert himself against it, and to form a party in it, as well as outside of it, which regarded him as its head. This forced the Whigs to throw themselves upon the nation at large; the Tories did the same; corruption withered away; and as Parliament came more and more under the watchful eye of the people, and responsible to it, the influence of the king declined and vanished.

of the state was, during the latter decades of the century, a factor apart from his ministers. They were not then, as now, a mere committee of Parliament dependent upon Parliament, but rather a compromise between the king's will and the will of the parliamentary majority. They deemed and declared themselves to owe a duty to the king conflicting with, sometimes overriding, their duty to Parliament. Those phrases of abasement before the Crown which when now employed by prime ministers amuse us by their remoteness from the realities of the case, then expressed realities. In 1787, when the Constitutional Convention met at Philadelphia, the Cabinet system of government was in England still immature. It was so immature that its true nature had not been perceived.[1] And although we now can see that the tendency was really towards the depression of the Crown and the exaltation of Parliament, men might well, when they compared the influence of George III. with that exercised by George I.,[2] argue in the terms of Dunning's famous resolution, that "the power of the Crown has increased, is increasing, and ought to be diminished."[3]

[1] Gouverneur Morris, however, one of the acutest minds in the Convention of 1787, remarked there, "Our President will be the British (Prime) Minister. If Mr. Fox had carried his India Bill, he would have made the Minister the King in form almost as well as in substance." —Elliot's *Debates*, i. 361.

[2] George III. had the advantage of being a national king, whereas his two predecessors had been Germans by language and habits as well as by blood. His popularity contributed to his influence in politics. Mrs. Papendiek's Diary contains some amusing illustrations of the exuberant demonstrations of "loyalty" which he excited. When he went to Weymouth for sea-bathing after his recovery from the first serious attack of lunacy, crowds gathered along the shore, and bands of music struck up "God save the King" when he ducked his head beneath the brine.

[3] It is not easy to say when the principle of the absolute dependence of ministers on a parliamentary majority without regard to the wishes of

The greatest problem that free peoples have to solve is how to enable the citizens at large to conduct or control the executive business of the state. England was in 1787 the only nation (the cantons of Switzerland were so small as scarcely to be thought of) that had solved this problem, firstly, by the development of a representative system, secondly, by giving to her representatives a large authority over the executive. The Constitutional Convention, therefore, turned its eyes to her when it sought to constitute a free government for the new nation which the "more perfect union" of the States was calling into conscious being.

Very few of the members of the Convention had been in England so as to know her constitution, such as it then was, at first hand. Yet there were three sources whence light fell upon it, and for that light they were grateful. One was their experience in dealing with the mother country since the quarrel began. They saw in Britain an executive largely influenced by the personal volitions of the king, and in its conduct of colonial and foreign affairs largely detached from and independent of Parliament, since it was able to take tyrannical steps without the previous knowledge or consent of Parliament, and able afterwards to defend

the Crown passed into a settled doctrine. (Needless to say that it has received no formally legal recognition, but is merely usage.) The long coincidence during the dominance of Pitt and his Tory successors down till 1827 of the wishes and interests of the Crown with those of the parliamentary majority prevented the question from arising in a practical shape. Even in 1827 Mr. Canning writes to J. W. Croker:—

"Am I to understand, then, that you consider the King [George IV.] as completely in the hands of the Tory aristocracy as his father, or rather as George II. was in the hands of the Whigs? If so, George III. reigned and Mr. Pitt (both father and son) administered the Government in vain. I have a better opinion of the real vigour of the Crown when it chooses to put forth its own strength, and I am not without some reliance on the body of the people"! —*Croker Correspondence*, vol. i. p. 368.

those steps by alleging a necessity whereof Parliament, wanting confidential information, could imperfectly judge. It was in these colonial and foreign affairs that the power of the Crown chiefly lay (as, indeed, to this day the authority of Parliament over the executive is smaller here than in any other department, because secrecy and promptitude are more essential), so they could not be expected to know for how much less the king counted in domestic affairs. Moreover, there was believed to be often a secret junto which really controlled the ministry, because acting in concert with the Crown; and the Crown had powerful engines at its disposal, bribes and honours, pensions and places, engines irresistible by the average virtue of representatives whose words and votes were not reported, and nearly half of whom were the nominees of some magnate.[1]

The second source was the legal presentation of the English Constitution in scientific text-books, and particularly in Blackstone, whose famous *Commentaries*, first published in 1765 (their substance having been delivered as professorial lectures at Oxford in 1758 and several succeeding years), had quickly become the standard authority on the subject. Now Blackstone, as is natural in a lawyer who looks rather to the strict letter of the law than to the practice which had grown up modifying it, describes the royal prerogative in terms more appropriate to the days of the Stuarts than to those in which he wrote, and dwells on the independence of the executive, while also declaring the withholding from it of legislative power to be essential to freedom.[2]

[1] The Crown itself had pocket boroughs. Hamilton doubted whether the British Constitution could be worked without corruption.

[2] See Blackstone, *Commentaries*, bk. i. chap. ii.—"Whenever the power of making and that of enforcing the laws are united together, there can be no public liberty. . . . Where the legislative and executive authority are in distinct hands, the former will take care not to en-

The third source was the view of the English Constitution given by the political philosophers of the eighteenth century, among whom, since he was by far the most important, we need look at Montesquieu alone.

When the famous treatise on *The Spirit of Laws* appeared in 1748, a treatise belonging to the small class of books which permanently turn the course of human thought, and which, unlike St. Augustine's *City of God*, turned it immediately instead of having to wait for centuries till the hour of its power arrived, it dwelt upon the separation of the executive, legislative, and judicial powers in the British Constitution as the most remarkable feature of that system. Accustomed to see the two former powers, and to some extent the third also, exercised by or under the direct control of the French monarch, Montesquieu attributed English freedom to their separation.[1] The King of Great Britain then possessed a larger prerogative than he has now, and as even then it seemed on paper much larger than it really was, it was natural that a foreign observer

trust the latter with so large a power as may tend to the subversion of its own independence, and therewith of the liberty of the subject. . . . The Crown cannot of itself begin any alteration in the present established law; but it may approve or disapprove of the alterations suggested and consented to by the two Houses. The legislative, therefore, cannot abridge the executive power of any rights which it now has by law without its own consent." There is no hint here, or in chap. vii. on the royal prerogative, that the royal power of disapproval had not been in fact exercised for some fifty years. Blackstone does not quote Montesquieu for the particular proposition that the powers must be separated, but has evidently been influenced by him. A little later he cites a famous dictum, "The President Montesquieu, though I trust too hastily, presages that as Rome, Sparta, and Carthage have lost their liberty and perished, so the Constitution of England will in time lose its liberty—will perish: it will perish whenever the legislative power shall become more corrupt than the executive."

[1] Locke had already remarked (*On Civil Government*, chap. xiv.) that "the legislative and executive powers are in distinct hands in all moderated monarchies and well-framed governments."

should underrate the executive character of the British Parliament and overrate the executive authority of the monarch as a person. Now Montesquieu's treatise was taken by the thinkers of the next generation as a sort of Bible of political philosophy. Hamilton and Madison, the two earliest exponents of the American Constitution they had done so much to create, cite it in the *Federalist* much as the schoolmen cite Aristotle, that is, they cite it as an authority which everybody will recognize to be binding; and Madison in particular constantly refers to this separation of the legislative, executive, and judicial powers as the distinguishing note of a free government.

These views of the British Constitution tallied with and were strengthened by the ideas and habits formed in the Americans by their experience of representative government in the colonies, ideas and habits which were after all the dominant factor in the construction of their political system. In these colonies the executive power had been vested either in a governor sent from England by the Crown, or in certain proprietors, as they were called, persons to whom the English Crown had granted hereditary rights in a province.[1] Along with these authorities there had existed representative assemblies, who made laws and voted money for the purposes of their respective commonwealths. They did not control the governor because his commission issued from the British Crown, and he was responsible thereto and not to the Colonial Government. A governor had no parliamentary cabinet, but only officials responsible to himself and the Crown. His veto on acts of the colonial legislature was frequently used; and that body, with no

[1] Maryland under Lord Baltimore is the familiar example.

means of controlling his conduct other than the refusal to vote money, was a legislature and nothing more. Thus the Americans found and admired in their colonial (or State) systems, a separation of the legislative from the executive branch, more complete than in England, because in the colonies no ministers sat in the legislature. And being already proud of their freedom, they attributed its amplitude chiefly to this cause.

From their colonial experience, coupled with these notions of the British Constitution, the men of 1787 drew three conclusions: Firstly, that the vesting of the executive and the legislative powers in different hands was the normal and natural feature of a free government. Secondly, that the power of the executive was dangerous to liberty, and must be kept within well-defined boundaries. Thirdly, that in order to check the head of the state it was necessary not only to define his powers, and appoint him for a limited period, but also to destroy his opportunities of influencing the legislature. Conceiving that ministers, as named by and acting under the orders of the President, would be his instruments rather than faithful representatives of the people, they resolved to prevent them from holding this double character, and therefore forbade "any person holding office under the United States" to be a member of either House.[1] They deemed that in this way they had rendered their legislature pure, independent, vigilant, the servant of the people, the foe of arbitrary power. Omnipotent, however, the framers of

[1] In 1700 the English Act of Settlement enacted that "no person who has an office or a place of profit under the King shall be capable of serving as a member of the House of Commons." This provision never took effect, having been repealed by the Act 4 Anne, c. 8. But the holding of the great majority of offices under the Crown is now, by statute, a disqualification for sitting in the House of Commons. See Anson, *Law and Custom of the Constitution*, vol. i. p. 174.

the Constitution did not mean to make it. They were sensible of the opposite dangers which might flow from a feeble and dependent executive. The proposal made in the first draft of the Constitution that Congress should elect the President, was abandoned, lest he should be merely its creature and unable to check it. To strengthen his position, and prevent intrigues among members of Congress for this supreme office, it was settled that the people should themselves, through certain electors appointed for the purpose, choose the President. By giving him the better status of a popular, though indirect, mandate, he became independent of Congress, and was encouraged to use his veto, which a mere nominee of Congress might have hesitated to do. Thus it was believed in 1787 that a due balance had been arrived at, the independence of Congress being secured on the one side and the independence of the President on the other. Each power holding the other in check, the people, jealous of their hardly-won liberties, would be courted by each, and safe from the encroachments of either.

There was of course the risk that controversies as to their respective rights and powers would arise between these two departments. But the creation of a court entitled to place an authoritative interpretation upon the Constitution in which the supreme will of the people was expressed, provided a remedy available in many, if not in all, of such cases, and a security for the faithful observance of the Constitution which England did not, and under her system of an omnipotent Parliament could not, possess.

"They builded better than they knew." They divided the legislature from the executive so completely as to make each not only independent, but weak

even in its own proper sphere. The President was debarred from carrying Congress along with him, as a popular prime minister may carry Parliament in England, to effect some sweeping change. He is fettered in foreign policy, and in appointments, by the concurrent rights of the Senate. He is forbidden to appeal at a crisis from Congress to the country. Nevertheless his office retains a measure of solid independence in the fact that the nation regards him as a direct representative and embodiment of its majesty, while the circumstance that he holds office for four years only makes it possible for him to do acts of power during those four years which would excite alarm from a permanent sovereign. Entrenched behind the ramparts of a rigid Constitution, he has retained rights of which his prototype the English king has been gradually stripped. Congress on the other hand was weakened, as compared with the British Parliament in which one House has become dominant, by its division into two co-equal houses, whose disagreement paralyses legislative action. And it lost that direct control over the executive which the presence of ministers in the legislature, and their dependence upon a majority of the popular House, give to the Parliaments of Britain and her colonies. It has diverged widely from the English original which it seemed likely, with only a slight difference, to reproduce.

The British House of Commons has grown to the stature of a supreme executive as well as legislative council, acting not only by its properly legislative power, but through its right to displace ministers by a resolution of want of confidence, and to compel the sovereign to employ such servants as it approves. Congress remains a pure legislature, unable to displace a minister, unable to choose the agents

by whom its laws are to be carried out, and having hitherto failed to develop that internal organization which a large assembly needs in order to frame and successfully pursue definite schemes of policy. Nevertheless, so far-reaching is the power of legislation, Congress has encroached, and may encroach still farther, upon the sphere of the executive. It encroaches not merely with a conscious purpose, but because the law of its being has forced it to create in its committees bodies whose expansion necessarily presses on the executive. It encroaches because it is restless, unwearied, always drawn by the progress of events into new fields of labour.

These observations may suffice to show why the Fathers of the Constitution did not adopt the English parliamentary or Cabinet system. They could not adopt it because they did not know of its existence. They did not know of it because it was still immature, because Englishmen themselves had not understood it, because the recognized authorities did not mention it.[1] There is not a word in Blackstone, much less in Montesquieu, as to the duty of ministers to resign at the bidding of the House of Commons, nor anything to indicate that the whole life of the House of Commons was destined to centre in the leadership of ministers. Whether the Fathers would have imitated the cabinet system had it been proposed to them as a model may be doubted.

[1] Roger Sherman saw the importance of the English Cabinet, though he looked on it as a mere engine in the Crown's hands. "The nation," he observed, in the Convention of 1787, "is in fact governed by the Cabinet council, who are the creatures of the Crown. The consent of Parliament is necessary to give sanction to their measures, and this they easily obtain by the influence of the Crown in appointing to all offices of honour and profit." It must be remembered that the House of Lords was far more powerful in 1787 than it is now, not only as a branch of the legislature, but in respect of the boroughs owned by the leading peers: and therefore the dependence of the ministry on the House of Commons was a less prominent feature of the Constitution than it is now.

They would probably have thought that the creation of a frame of government so unified, so strong, so capable of swiftly and irresistibly accomplishing the purposes of a transitory majority as we now perceive it to be, might prove dangerous to those liberties of the several States, as well as of individual citizens, which filled the whole background of their landscape. But as the idea never presented itself, we cannot say that it was rejected, nor cite the course they took as an expression of their judgment against the system under which England and her colonies have so far prospered.

That system could not be deemed to have reached its maturity till the power of the people at large had been established by the Reform Act of 1832. For its essence resides in the delicate equipoise it creates between the three powers, the ministry, the House of Commons, and the people. The House is strong, because it can call the ministry to account for every act, and can, by refusing supplies, compel their resignation. The ministry are not defenceless, because they can dissolve Parliament, and ask the people to judge between it and them. Parliament, when it displaces a ministry, does not strike at executive authority: it merely changes its agents. The ministry, when they dissolve Parliament, do not attack Parliament as an institution: they recognize the supremacy of the body in asking the country to change the individuals who compose it. Both the House of Commons and the ministry act and move in the full view of the people, who sit as arbiters, prepared to judge in any controversy that may arise. The House is in touch with the people, because every member must watch the lights and shadows of sentiment which play over his own constituency. The ministry are in touch with the people, because they are not only themselves

representatives, but are heads of a great party, sensitive to its feelings, forced to weigh the effect of every act they do upon the confidence which their party places in them. The only conjuncture which this system of "checks and balances" does not provide for is that of a ministry supported by a parliamentary majority pursuing a policy which was not presented to the people at the last general election, and of which the bulk of the people in fact disapprove.[1] This is a real danger, yet one which can seldom last long enough to work grave mischief, for the organs of public opinion are now so potent, and the opportunities for its expression so numerous, that the anger of a popular majority, perhaps even of a very strong minority, is almost certain to alarm both the ministry and the House, and to arrest them in their course.[2]

The drawback to this system of exquisite equipoise is the liability of its equilibrium to be frequently disturbed, each disturbance involving either a change of government, with immense temporary inconvenience to the departments, or a general election, with immense expenditure of money and trouble in the country. It is

[1] The recent leading case on this subject is that of Lord Beaconsfield's Government from 1876 till 1880. It followed, during the years 1877 and 1878, a foreign policy which the bulk of the electors apparently disapproved (though some persons hold that there was not a disapproving majority in the country till 1879), but which Parliament sanctioned by large majorities. But the vehement popular agitation of 1876-78 seems to have had the effect of considerably modifying the policy of the ministry, though it could not wholly change its direction.

[2] "The dangers arising from a party spirit in Parliament exceeding that of the nation, and of a selfishness in Parliament contradicting the true interest of the nation, are not great dangers in a country where the mind of the nation is steadily political, and where its control over its representatives is constant. A steady opposition to a formed public opinion is hardly possible in our House of Commons, so incessant is the national attention to politics, and so keen the fear in the mind of each member that he may lose his valued seat."—Walter Bagehot, *English Constitution*, p. 241. These remarks of the most acute of English political writers are even more true now than they were in 1872.

a system whose successful working presupposes the existence of two great parties and no more, parties each strong enough to restrain the violence of the other, yet one of them steadily preponderant in any given House of Commons. Where a third, perhaps a fourth, party appears, the conditions are changed. The scales of Parliament oscillate as the weight of this detached group is thrown on one side or the other; dissolutions become more frequent, and even dissolutions may fail to restore stability. The recent history of the French Republic shows the difficulties of working a Chamber composed of groups: nor is the same source of difficulty unknown in England.

It is worth while to compare the form which a constitutional struggle takes under the Cabinet system and under that of America.

In England, if the executive ministry displeases the House of Commons, the House passes an adverse vote. The ministry have their choice to resign or to dissolve Parliament. If they resign, a new ministry is appointed from the party which has proved itself strongest in the House of Commons; and co-operation being restored between the legislature and the executive, public business proceeds. If, on the other hand, the ministry dissolve Parliament, a new Parliament is sent up which, if favourable to the existing cabinet, keeps them in office, if unfavourable, dismisses them forthwith.[1] Accord is in either case restored. Should the difference arise between the House of Lords and a ministry sup-

[1] Recent instances, dating from Mr. Disraeli's resignation in December 1868, when the results of the election of that year were ascertained, have established the usage that a ministry quits office, without waiting to be turned out, when they know that the election has gone against them. Mr. Gladstone resigned forthwith after the General Elections of 1874 and 1886, Lord Beaconsfield after that of 1880. The usage, however, is not yet a rule of the Constitution, though it seems on the way to become one.

ported by the House of Commons, and the former persist in rejecting a bill which the Commons send up, a dissolution is the constitutional remedy; and if the newly-elected House of Commons reasserts the view of its predecessor, the Lords, according to the now recognized constitutional practice, yield at once. Should they, however, still stand out, there remains the extreme expedient, threatened in 1832, but never yet resorted to, of a creation by the sovereign (*i.e.* the ministry) of new peers sufficient to turn the balance of votes in the Upper House. Practically the ultimate decision always rests with the people, that is to say, with the party which for the moment commands a majority of electoral votes. This method of cutting knots applies to all differences that can arise between executive and legislature. It is a swift and effective method; in this swiftness and effectiveness lie its dangers as well as its merits.

In America a dispute between the President and Congress may arise over an executive act or over a bill. If over an executive act, an appointment or a treaty, one branch of Congress, the Senate, can check the President, that is, can prevent him from doing what he wishes, but cannot make him do what they wish. If over a bill which the President has returned to Congress unsigned, the two Houses can, by a two-thirds majority, pass it over his veto, and so end the quarrel; though the carrying out of the bill in its details must be left to him and his ministers, whose dislike of it may render them unwilling and therefore unsuitable agents. Should there not be a two-thirds majority, the bill drops; and however important the question may be, however essential to the country some prompt dealing with it, either in the sense desired by the majority of Congress

or in that preferred by the President, nothing can be done till the current term of Congress expires. The matter is then remitted to the people. If the President has still two more years in office, the people may signify their approval of his policy by electing a House in political agreement with him, or disapprove it by re-electing a hostile House. If the election of a new President coincides with that of the new House, the people have a second means provided of expressing their judgment. They may choose not only a House of the same or an opposite complexion to the last, but a President of the same or an opposite complexion. Anyhow they can now establish accord between one house of Congress and the executive.[1] The Senate, however, may still remain opposed to the President, and may not be brought into harmony with him until a sufficient time has elapsed for the majority in it to be changed by the choice of new senators by the State legislatures. This is a slower method than that of Britain. It may fail in a crisis needing immediate action; but it escapes the danger of a hurried and perhaps irrevocable decision.

There exists between England and the United States a difference which is full of interest. In England the legislative branch has become supreme, and it is considered by Englishmen a merit in their system that the practical executive of the country is directly responsible to the House of Commons. In the United States, however, not only in the national government, but in every

[1] It is of course possible that the people may elect at the same time a President belonging to one party and a House the majority whereof belongs to the other party. This happened in 1876, when, however, the presidential election was disputed. It is rendered possible by the fact that the President is elected on a different plan from the House, the smaller States having relatively more weight in a presidential election, and the presidential electors being now chosen, ine ach State, by "general ticket," not in districts.

one of the States, the exactly opposite theory is proceeded upon—that the executive should be wholly independent of the legislative branch. Americans understand that this scheme involves a loss of power and efficiency, but they believe that it makes greatly for safety in a popular government. They expect the executive and the legislature to work together as well as they can, and public opinion does usually compel a degree of co-operation and efficiency which perhaps could not be expected theoretically. It is an interesting commentary on the tendencies of democratic government, that in America reliance is coming to be placed more and more, in the nation, in the State, and in the city, upon the veto of the Executive as a protection to the community against the legislative branch. Weak Executives frequently do harm, but a strong Executive has rarely abused popular confidence. On the other hand, instances where the Executive, by the use of his veto power, has arrested mischiefs due to the action of the legislature are by no means rare. This circumstance leads some Americans to believe that the day is not far distant when in England some sort of veto power, or other constitutional safeguard, must be interposed to protect the people against their Parliament.[1]

While some bid England borrow from her daughter, other Americans conceive that the separation of the legislature from the executive has been carried too far in the United States, and suggest that it would be an improvement if the ministers of the President were permitted to appear in both Houses of Congress to answer questions, perhaps even to join in debate. I have no space to discuss the merits of this proposal, but must observe that it might lead to changes more

[1] See Note to Chapter XXXV. at the end of this volume.

extensive than its advocates seem to contemplate. The more the President's ministers come into contact with Congress, the more difficult will it be to maintain the independence of Congress which he and they now possess. When not long ago the Norwegian Stor Thing forced the King of Sweden and Norway to consent to his ministers appearing in that legislature, the king, perceiving the import of the concession, resolved to choose in future ministers in accord with the party holding a majority in the Stor Thing. It is hard to say, when one begins to make alterations in an old house, how far one will be led on in rebuilding, and I doubt whether this change in the present American system, possibly in itself desirable, might not be found to involve a reconstruction large enough to put a new face upon several parts of that system.

In the history of the United States there have been four serious conflicts between the legislature and the executive. The first was that between President Jackson and Congress. It ended in Jackson's favour, for he got his way; but he prevailed because during the time when both Houses were against him, his opponents had not a two-thirds majority. In the latter part of the struggle the (re-elected) House was with him; and before he had quitted office his friends obtained a majority in the always-changing Senate. But his success was not so much the success of the executive office as of a particular President popular with the masses. The second contest, which was between President Tyler and both Houses of Congress, was a drawn battle, because the majority in the Houses fell short of two-thirds. In the third, between President Johnson and Congress, Congress prevailed; the enemies of the President having, owing to the disfranchisement of most Southern States, an over-

powering majority in both Houses, and by that majority carrying over his veto a series of Acts so peremptory that even his reluctance to obey them could not destroy, though it sometimes marred, their efficiency. In the fourth case, referred to in a previous chapter, the victory remained with the President, because the Congressional majority against him was slender. But a presidential victory is usually a negative victory. It consists not in his getting what he wants, but in his preventing Congress from getting what it wants.[1] The practical result of the American arrangements thus comes to be that when one party possesses a large majority in Congress it can overpower the President, taking from him all but a few strictly reserved functions, such as those of pardoning, of making promotions in the army and navy, and of negotiating (not of concluding treaties, for these require the assent of the Senate) with foreign states. Where parties are pretty equally divided, *i.e.* when the majority is one way in the Senate, the other way in the House, or when there is only a small majority against the President in both Houses, the President is in so far free that new fetters cannot be laid upon him; but he must move under those which previous legislation has imposed, and can take no step for which new legislation is needed.

It is another and a remarkable consequence of the absence of cabinet government in America, that there is also no party government in the European sense. Party government in France, Italy, and England means, that one set of men, united, or professing to

[1] In the famous case of President Jackson's removal of the government deposits of money from the United States Bank, the President did accomplish his object. But this was a very exceptional case, because one which had remained within the executive discretion of the President since no statute had happened to provide for it.

be united, by holding one set of opinions, have obtained control of the whole machinery of government, and are working it in conformity with those opinions. Their majority in the country is represented by a majority in the legislature, and to this majority the ministry of necessity belongs. The ministry is the supreme committee of the party, and controls all the foreign as well as domestic affairs of the nation, because the majority is deemed to be the nation. It is otherwise in America. Men do, no doubt, talk of one party as being "in power," meaning thereby the party to which the then President belongs. But they do so because that party enjoys the spoils of office, in which to so many politicians the value of power consists. They do so also because in the early days the party which prevailed in the legislative usually prevailed also in the executive department, and because the presidential election was, and still is, the main struggle which proclaimed the predominance of one or other party.[1]

But the Americans, when they speak of the administration party as the party in power, have, in borrowing an English phrase, applied it to utterly different facts. Their "party in power" need have no "power" beyond that of securing places for its adherents. It may be in a minority in one House of Congress, in which event it accomplishes nothing, but can at most merely arrest adverse legislation, or in a small minority in both Houses of Congress, in which event it must submit to see many things done which it dislikes. And if

[1] The history of the Republic divides itself in the mind of most Americans into a succession of Presidents and Administrations, just as old-fashioned historians divided the history of England by the reigns of kings, a tolerable way of reckoning in the days of Edward the Third and Richard the Second, when the personal gifts of the sovereign were a chief factor in affairs, but absurd in the days of George the Fourth and William the Fourth.

its enemies control the Senate, even its executive arm is paralysed. Though party feeling has generally been stronger in America than in England, and even now covers a larger proportion of the voters, and enforces a stricter discipline, party government is distinctly weaker.

Those who lament the violence of European factions may fancy America an Elysium where legislation is just and reasonable, because free from bias, where pure and enlarged views of national interest override the selfish designs of politicians. It would be nearer the truth to say that the absence of party control operates chiefly to make laws less consistent, and to prevent extended schemes of policy from being framed, because the chance of giving continuous effect to them is small. The natural history of the party system belongs to a later part of this book. I will only here observe that, while this system is complete and well compacted in every other respect, the Constitution has denied to it some of the means which European methods afford of acting through both the legislature and the executive at once on the direct and daily government of the country.

We are now in a position to sum up the practical results of the system which purports to separate Congress from the executive, instead of uniting them as they are united under a cabinet government. I say "purports to separate," because it is plain that the separation, significant as it is, is less complete than current language imports, or than the Fathers of the Constitution would seem to have intended. The necessary coherence of the two powers baffled them. These results are five:—

The President and his ministers have no initiative in Congress, little influence over Congress, except what they can exert upon individual members through the bestowal of patronage.

Congress has, together with unlimited powers of inquiry, imperfect powers of control over the administrative departments.

The nation does not always know how or where to fix responsibility for misfeasance or neglect. The person and bodies concerned in making and executing the laws are so related to one another that each can generally shift the burden of blame on some one else, and no one acts under the full sense of direct accountability.

There is a loss of force by friction—*i.e.* part of the energy, force, and time of the men and bodies that make up the government is dissipated in struggles with one another. This belongs to all free governments, because all free governments rely upon checks. But the more checks, the more friction.

There is a risk that executive vigour and promptitude may be found wanting at critical moments.

We may include these defects in one general expression. There is in the American government, considered as a whole, a want of unity. Its branches are unconnected; their efforts are not directed to one aim, do not produce one harmonious result. The sailors, the helmsman, the engineer, do not seem to have one purpose or obey one will, so that instead of making steady way the vessel may pursue a devious or zigzag course, and sometimes merely turn round and round in the water. The more closely any one watches from year to year the history of free governments, and himself swims in the deep-eddying time current, the more does he feel that current's force, so that human foresight and purpose seem to count for little, and ministers and parliaments to be swept along they know not whither by some overmastering fate or

overruling providence. But this feeling is stronger in America than in Europe, because in America such powers as exist act, with little concert and resign themselves to a conscious impotence. Clouds arise, blot out the sun overhead, and burst in a tempest; the tempest passes, and leaves the blue above bright as before, but at the same moment other clouds are already beginning to peer over the horizon. Parties are formed and dissolved, compromises are settled and assailed and violated, wars break out and are fought through and forgotten, new problems begin to show themselves, and the civil powers, Presidents, and Cabinets, and State governments, and Houses of Congress, seem to have as little to do with all these changes, as little ability to foresee or avert or resist them, as the farmer, who sees approaching the tornado which will uproot his crop, has power to stay its devastating course.

A President can do little, for he does not lead either Congress or the nation. Congress cannot guide or stimulate the President, nor replace him by a man fitter for the emergency. The Cabinet neither receive a policy from Congress nor give one to it. Each power in the state goes its own way, or wastes precious moments in discussing which way it shall go, and that which comes to pass seems to be a result not of the action of the legal organs of the state, but of some larger force which at one time uses their discord as its means, at another neglects them altogether. This at least is the impression which the history of the greatest problem and greatest struggle that America has seen, the struggle of the slaveholders against the Free Soil and Union party, culminating in the war of the rebellion, makes upon one who looking back on its events sees them all as parts of one drama. The carefully devised machinery of the

Constitution did little to solve that problem or avert that struggle. The nation asserted itself at last, but not till this machinery had failed to furnish a peaceful means of trying the real strength of the parties, so as to give the victory to one or to settle a compromise between them.

Not wholly dissimilar was the course of events in the first years of the French Revolution. The Constitution framed by the National Assembly in 1791 so limited the functions and authority of each power in the state that no one person, no one body, was capable of leading either the nation or the legislature, or of framing and maintaining a constructive policy. Things were left to take their own course. The boat drifted to the rapids, and the rapids hurried her over the precipice.[1]

This want of unity is painfully felt in a crisis. When a sudden crisis comes upon a free state, the executive needs two things, a large command of money and powers in excess of those allowed at ordinary times. Under the European system the duty of meeting such a crisis is felt to devolve as much on the representative Chamber as on the ministers who are its agents. The Chamber is therefore at once appealed to for supplies, and for such legislation as the occasion demands. When these have been given, the ministry moves on with the weight of the people behind it; and as it is accustomed to work at all times with the Chamber, and the Chamber with it, the piston plays smoothly and quickly in the cylinder. In America the President has at ordinary times little to do with Congress, while Congress is unaccustomed to deal

[1] This Constitution of 1791 was framed under the same idea of the need for separating the executive and legislative departments which prevailed at Philadelphia in 1787. For want of a legitimate supreme power, power at last fell into the hands of the Committee of Public Safety, and afterwards of the Directory.

with executive questions. Its machinery, and especially the absence of ministerial leaders and consequent want of organization, unfit it for promptly confronting practical troubles. It is apt to be sparing of supplies, and of that confidence which doubles the value of supplies. Jealousies of the executive, which are proper in quiet times and natural towards those with whom Congress has little direct intercourse, may now be perilous, yet how is Congress to trust persons not members of its own body nor directly amenable to its control? When dangers thicken the only device may be the Roman one of a temporary dictatorship. Something like this happened in the War of Secession, for the powers then conferred upon President Lincoln, or exercised without congressional censure by him, were almost as much in excess of those enjoyed under the ordinary law as the authority of a Roman dictator exceeded that of a Roman consul.[1] Fortunately the habits of legality, which lie deep in the American as they did in the Roman people, reasserted themselves after the war was over, as they were wont to do at Rome in her earlier and better days. When the squall had passed the ship righted, and she has pursued her subsequent course on as even a keel as before.

The defects of the tools are the glory of the workman. The more completely self-acting is the machine,

[1] There is a story that President Lincoln said to Salmon P. Chase, his secretary of the treasury, in the early days of the war: "These rebels are violating the Constitution to destroy the Union. I will violate the Constitution if necessary to save the Union; and I suspect, Chase, that our Constitution is going to have a rough time of it before we get done with this row." Mr. Hay, however, the distinguished biographer of Lincoln, to whom I have applied for information, doubts the authenticity of the anecdote, as does also Mr. Robert T. Lincoln. President Lincoln usually argued that his use of extraordinary powers was provided for in the Constitution. See, however, the passage in his so-called Hodges Letter, quoted in a note to Chapter XXXIV.

the smaller is the intelligence needed to work it; the more liable it is to derangement, so much greater must be the skill and care applied by one who tends it. The English Constitution, which we admire as a masterpiece of delicate equipoises and complicated mechanism, would anywhere but in England be full of difficulties and dangers. It stands and prospers in virtue of the traditions that still live among English statesmen and the reverence that has ruled English citizens. It works by a body of understandings which no writer can formulate, and of habits which centuries have been needed to instil. So the American people have a practical aptitude for politics, a clearness of vision and capacity for self-control never equalled by any other nation. In 1861 they brushed aside their darling legalities, allowed the executive to exert novel powers, passed lightly laws whose constitutionality remains doubtful, raised an enormous army, and contracted a prodigious debt. Romans could not have been more energetic in their sense of civic duty, nor more trustful to their magistrates. When the emergency had passed away the torrent which had overspread the plain fell back at once into its safe and well-worn channel. The reign of legality returned; and only four years after the power of the executive had reached its highest point in the hands of President Lincoln, it was reduced to its lowest point in those of President Johnson. Such a people can work any Constitution. The danger for them is that this reliance on their skill and their star may make them heedless of the faults of their political machinery, slow to devise improvements which are best applied in quiet times.

CHAPTER XXVI

GENERAL OBSERVATIONS ON THE FRAME OF NATIONAL GOVERNMENT

THE account which has been so far given of the working of the American Government has been necessarily an account rather of its mechanism than of its spirit. Its practical character, its temper and colour, so to speak, largely depend on the party system by which it is worked, and on what may be called the political habits of the people. These will be described in later chapters. Here, however, before quitting the study of the constitutional organs of government, it is well to sum up the criticisms we have been led to make, and to add a few remarks, for which no fitting place could be found in preceding chapters, on the general features of the national government.

I. No part of the Constitution cost its framers so much time and trouble as the method of choosing the President. They saw the evils of a popular vote. They saw also the objections to placing in the hands of Congress the election of a person whose chief duty it was to hold Congress in check. The plan of having him selected by judicious persons, specially chosen by the people for that purpose, seemed to meet both difficulties, and was therefore recommended with confidence. The

result has, however, so completely falsified these expectations that it is hard to comprehend how they came to be entertained. The presidential electors are mere ciphers, who vote, as a matter of course, for the candidate of the party which names them; and the President is practically chosen by the people at large. The only importance which the elaborate machinery provided in the Constitution retains, is that it prevents a simple popular vote in which the majority of the nation should prevail, and makes the issue of the election turn on the voting in certain "pivotal" States.

II. The choice of the President, by what is now practically a simultaneous popular vote, not only involves once in every four years a tremendous expenditure of energy, time, and money, but induces of necessity a crisis which, if it happens to coincide with any passion powerfully agitating the people, may be dangerous to the commonwealth.

III. There is always a risk that the result of a presidential election may be doubtful or disputed on the ground of error, fraud, or violence. When such a case arises, the difficulty of finding an authority competent to deal with it, and likely to be trusted, is extreme. Moreover, the question may not be settled until the pre-existing executive has, by effluxion of time, ceased to have a right to the obedience of the citizens. The experience of the election of 1876 illustrates these dangers. Such a risk of interregna is incidental to all systems, monarchic or republican, which make the executive head elective, as witness the Romano-Germanic Empire of the Middle Ages, and the Papacy. But it is more serious where he is elected by the people than where, as in France or Switzerland, he is chosen by the Chambers.[1]

[1] In Switzerland the Federal Council of seven are elected by the two

IV. The change of the higher executive officers, and of many of the lower executive officers also, which usually takes place once in four years, gives a jerk to the machinery, and causes a discontinuity of policy, unless, of course, the President has served only one term, and is re-elected. Moreover, there is generally a loss either of responsibility or of efficiency in the executive chief magistrate during the last part of his term. An outgoing President may possibly be a reckless President, because he has little to lose by misconduct, little to hope from good conduct. He may therefore abuse his patronage, or gratify his whims with impunity. But more often he is a weak President.[1] He has little influence with Congress, because his patronage will soon come to an end, little hold on the people, who are already speculating on the policy of his successor. His secretary of state cannot treat boldly with foreign powers, who perceive that he has a diminished influence in the Senate, and know that the next secretary may have different views.

The above considerations suggest the inquiry whether the United States, which no doubt needed a President in 1789 to typify the then created political unity of the nation, might not now dispense with one. This question, however, has never been raised in a practical form in

Chambers, and then elect one of their own number to be their President, and therewith also President of the Confederation (Constit. of 1874, art. 98). In some British colonies it has been provided that, in case of the absence or death or incapacity of the Governor, the Chief Justice shall act as Governor. In India the senior member of Council acts in similar cases for the Viceroy.

[1] A British House of Commons in the last few months before its impending dissolution usually presents the same alternations of recklessness (generally taking the form of electioneering bids to powerful sections of opinion in the country) and feebleness which shrinks from entering on any large scheme of policy, or giving any important decision. This was marked in the latter part of the session of 1885.

America, where the people approve the office, though dissatisfied with the method of choice.[1]

The strength and worth of the office reside in its independence of Congress and direct responsibility to the people. Americans condemn any plan under which, as lately befell in France, the legislature can drive a President from power and itself proceed to choose a new one.

V. The Vice-President's office is ill-conceived. His only ordinary function is to act as Chairman of the Senate, but as he does not appoint the Committees of that House, and has not even a vote (except a casting vote) in it, this function is of little moment. If, however, the President dies, or becomes incapable of acting, or is removed from office, the Vice-President succeeds to the Presidency. What is the result? The place being in itself unimportant, the choice of a candidate for it excites little interest, and is chiefly used by the party managers as a means of conciliating a section of their party. It becomes what is called "a complimentary nomination." The man elected Vice-President is therefore never a man in the front rank. But when the President dies during his term of office, which has happened to four out of the seventeen Presidents, this second-class man steps into a great place for which he was never intended. Sometimes, as in the case of Mr. Arthur, he fills the place respectably. Sometimes, as in that of Andrew Johnson, he throws the country into confusion.[2]

He is *aut nullus aut Cæsar*.

[1] The question of replacing the President by a ministerial council is rarely discussed in America. It has recently been mooted in France.

[2] Mr. James G. Blaine observes that a Vice-President having honour but no power is usually the malcontent centre of disappointed and discontented men, as the heir-presumptive to the throne is apt to be in monarchies.—*Twenty Years in Congress*, vol. ii. p. 57.

VI. The defects in the structure and working of Congress, and in its relations to the executive, have been so fully dwelt on already that it is enough to refer summarily to them. They are—

The discontinuity of Congressional policy.

The want of adequate control over officials.

The want of opportunities for the executive to influence the legislature.[1]

The want of any authority charged to secure the passing of such legislation as the country needs.

The frequency of disputes between three co-ordinate powers, the President, the Senate, and the House.

The maintenance of a continuous policy is a difficulty in all popular governments. In the United States it is specially so, because—

The executive head and his ministers are necessarily (unless when a President is re-elected) changed once every four years.

One House of Congress is changed every two years.

Neither House recognizes permanent leaders.

No accord need exist between Congress and the executive.

There is (as already explained) no such thing as a party in power, in the European sense of the term. The Americans use it to denote the party to which the President belongs. But this party may be in a minority in one or both Houses of Congress, in which case it can-

[1] It is remarked by Mr. Horace White (*Fortnightly Review*, 1879) that the quality of the President's cabinet suffers by the exclusion of ministers from Congress, because if they had to hold their own and defend their master's policy in the House, the President would be driven to select able men instead of, as has sometimes happened, his own personal friends. This is true; though Europeans may answer that under the English system it sometimes happens that men are placed in great administrative office only because they are able speakers, and persons of higher administrative gifts passed over because they have not a seat in Parliament or are unready in debate.

not do anything which requires fresh legislation,—may be in a minority in the Senate, in which case it can take no executive act of importance.

There is no true leadership in political action, because the most prominent man has no recognized party authority. Congress was not elected to support him. He cannot threaten disobedient followers with a dissolution of Parliament like an English prime minister. He has not even the French president's right of dissolving the House with the consent of the Senate.

There is often no general and continuous cabinet policy, because the cabinet has no authority over Congress, may perhaps have no influence with it.

There is no general or continuous legislative policy, because the legislature, having no recognized leaders, and no one guiding committee, acts through a large number of committees, independent of one another, and seldom able to bring their measures to maturity. What continuity exists is due to the general acceptance of a few broad maxims, such as that of non-intervention in the affairs of the Old World, and to the fact that a large nation does not frequently or lightly change its views upon leading principles. In minor matters of legislation and administration there is little settled policy. The Houses trifle with questions, take them up in one session and drop them the next, seem insensible to the duty of completing work once begun. It is no one's business to press this duty on them.

There is no security that Congress will attend to such minor defects in the administrative system of the country as may need a statute to correct them. In Europe the daily experience of the administrative departments discloses small faults or omissions in

the law which involve needless trouble to officials, needless cost to the treasury, needless injustice to classes of the people. Sometimes for their own sakes, sometimes from that desire to see things well done which is the life-breath of a good public servant, the permanent officials call the attention of their parliamentary chief, the minister, to the defective state of the law, and submit to him the draft of a bill to amend it. He brings in this bill, and if it involves no matter of political controversy (which it rarely does), he gets it passed.[1] As an American minister does not sit in Congress, and has no means of getting anything he proposes attended to there, it is a mere chance if such amending statutes as these are introduced or pass into law.

These defects are all reducible to two. There is an excessive friction in the American system, a waste of force in the strife of various bodies and persons created to check and balance one another. There is a want of executive unity, and therefore a possible want of executive vigour. Power is so much subdivided that it is hard at a given moment to concentrate it for prompt and effective action. In fact, this happens only when a distinct majority of the people are so clearly of one mind that the several co-ordinate organs of government obey this majority, uniting their efforts to serve its will.

VII. The relations of the people to the legislature are far from perfect. These relations are in every free country so much the most refined and delicate, as well as so much the most important part of the whole scheme and doctrine of government, that we must not expect to find

[1] This remark applies rather to France, Germany, and Italy, than to England, because of late years the rules of the English House of Commons have enabled a single private member so to retard as usually to defeat any measure which the Government does not put forth its full strength to carry.

perfection anywhere. But comparing America with Great Britain from 1832 to 1885, for it is still too soon to judge the condition of things created by the Reform Acts of that year, the working of the representative system in America seems somewhat inferior.

There are four essentials to the excellence of a representative system:—

That the representatives shall be chosen from among the best men of the country, and, if possible, from its natural leaders.

That they shall be strictly and palpably responsible to their constituents for their speeches and votes.

That they shall have courage enough to resist a momentary impulse of their constituents which they think mischievous, *i.e.* shall be representatives rather than mere delegates.

That they individually, and the Chamber they form, shall have a reflex action on the people, *i.e.* that while they derive authority from the people, they shall also give the people the benefit of the experience they acquire in the Chamber, as well as of the superior knowledge and capacity they may be presumed to possess.

Americans declare, and no doubt correctly, that of these four requisites, the first, third, and fourth are not attained in their country. Congressmen are not chosen from among the best citizens. They mostly deem themselves mere delegates. They do not pretend to lead the people, being indeed seldom specially qualified to do so.

But one also learns in America that the second requisite, responsibility, is not fully realized. This seems surprising in a democratic country, and indeed almost inconsistent with that conception of the repre-

sentative as a delegate, which is supposed, perhaps erroneously, to be characteristic of democracies. Still the fact is there. One cause, on which I have already dwelt, is to be found in the committee system. Another is the want of organized leadership in Congress. An English member's responsibility usually takes the form of his being bound to support the leader of his party on all important divisions. In America, this obligation attaches only when the party has "gone into caucus," and there resolved upon its course. Seeing that the member need not obey the leader, the leader cannot be held responsible for the action of the rank and file. As a third cause we may note the fact that owing to the restricted competence of Congress many of the questions which chiefly interest the voter do not come before Congress at all, so that its proceedings are not followed with that close and keen attention which the debates and divisions of European Chambers excite.

One may say in general that the reciprocal action and reaction between the electors and Congress, what is commonly called the "touch" of the people with their agents, is not sufficiently close, quick, and delicate. Representatives ought to give light and leading to the people, just as the people give stimulus and momentum to their representatives. This incidental merit of the parliamentary system is among its greatest merits. But in America the action of the voter fails to tell upon Congress. He votes for a candidate of his own party, but he does not convey to that candidate an impulse towards the carrying of particular measures, because the candidate when in Congress will be practically unable to promote those measures, unless he happens to be placed on the committee to which they are referred. Hence the citizen, when he casts his

ballot, can seldom feel that he is advancing any measure or policy, except the vague and general policy indicated in his party platform. He is voting for a party, but he does not know what the party will do, and for a man, but a man whom chance may deprive of the opportunity of advocating the measures he cares most for.

Conversely, Congress does not guide and illuminate its constituents. It is amorphous, and has little initiative. It does not focus the light of the nation, does not warm its imagination, does not dramatize principles in the deeds and characters of men.[1] This happens because, in ordinary times, it lacks great leaders, and the most obvious cause why it lacks them, is its disconnection from the executive. As it is often devoid of such men, so neither does the country habitually come to it to look for them. In the old days, neither Hamilton, nor Jefferson, nor John Adams, in our own time, neither Stanton, nor Grant, nor Tilden, nor Cleveland, ever sat in Congress. Lincoln sat for two years only, and owed little of his subsequent eminence to his career there.

VIII. The independence of the judiciary, due to its holding for life, has been a conspicuous merit of the Federal system, as compared with the popular election and short terms of judges in most of the States. Yet even the Federal judiciary is not secure from the attacks of the two other powers, if combined. For the legislature may by statute increase the number of

[1] As an illustration of the want of the dramatic element in Congress, I may mention that some at least of the parliamentary debating societies in the American colleges (colleges for women included) take for their model not either House of Congress but the British House of Commons, the students conducting their debates under the names of prominent members of that assembly. They say that they do this because Congress has no Ministry and no leaders of the Opposition.

Federal justices, increase it to any extent, since the Constitution leaves the number undetermined, and the President may appoint persons whom he knows to be actuated by a particular political bias, perhaps even prepared to decide specific questions in a particular sense. Thus he and Congress together may, if not afraid of popular displeasure, obtain such a judicial determination of any constitutional question as they join in desiring, even although that question has been heretofore differently decided by the Supreme court. The only safeguard is in the disapproval of the people.

It is worth remarking that the points in which the American frame of national government has proved least successful are those which are most distinctly artificial, *i.e.* those which are not the natural outgrowth of old institutions and well-formed habits, but devices consciously introduced to attain specific ends.[1] The election of the President and Vice-President by electors appointed *ad hoc* is such a device. The functions of the judiciary do not belong to this category; they are the natural outgrowth of common law doctrines and of the previous history of the colonies and States; all

[1] See Chapter IV. *ante*, and Note thereto, in which it is shown that most of the provisions of the Federal Constitution which have worked well were drawn from the Constitutions of the several States.

This may seem to be another way of saying that nature, *i.e.* historical development, is wiser than the wisest men. Yet it must be remembered that what we call historical development is really the result of a great many small expedients invented by men during many generations for curing the particular evils in their government which from time to time had to be cured. The moral therefore is that a succession of small improvements, each made conformably to existing conditions and habits, is more likely to succeed than a large scheme, made all at once in what may be called the spirit of conscious experiment. The Federal Constitution has been generally supposed in Europe to have been such a scheme, and its success has encouraged other countries to attempt similar bold and large experiments. This is an error. The Constitution of the United States is almost as truly the matured result of long and gradual historical development as the English Constitution itself.

that is novel in them, for it can hardly be called artificial, is the creation of Courts co-extensive with the sphere of the national government.

All the main features of American government may be deduced from two principles. One is the sovereignty of the people, which expresses itself in the fact that the supreme law—the Constitution—is the direct utterance of their will, that they alone can amend it, that it prevails against every other law, that whatever powers it does not delegate are deemed to be reserved to it, that every power in the State draws its authority, whether directly, like the House of Representatives, or in the second degree, like the President and the Senate, or in the third degree, like the Federal judiciary, from the people, and is legally responsible to the people, and not to any one of the other powers.

The second principle, itself a consequence of this first one, is the distrust of the various organs and agents of government. The States are carefully safeguarded against aggression by the central government. So are the individual citizens. Each organ of government, the executive, the legislature, the judiciary, is made a jealous observer and restrainer of the others. Since the people, being too numerous, cannot directly manage their affairs, but must commit them to agents, they have resolved to prevent abuses by trusting each agent as little as possible, and subjecting him to the oversight of other agents, who will harass and check him if he attempts to overstep his instructions.

Some one has said that the American Government and Constitution are based on the theology of Calvin and the philosophy of Hobbes. This at least is true, that there is a hearty Puritanism in the view of human nature which pervades the instrument of 1787. It is

the work of men who believed in original sin, and were resolved to leave open for transgressors no door which they could possibly shut.[1] Compare this spirit with the enthusiastic optimism of the Frenchmen of 1789. It is not merely a difference of race temperaments; it is a difference of fundamental ideas.

With the spirit of Puritanism there is blent a double portion of the spirit of legalism. Not only is there no reliance on ethical forces to help the government to work: there is an elaborate machinery of law to preserve the equilibrium of each of its organs. The aim of the Constitution seems to be not so much to attain great common ends by securing a good government as to avert the evils which will flow, not merely from a bad government, but from any government strong enough to threaten the pre-existing communities or the individual citizen.

The spirit of 1787 was an English spirit, and therefore a conservative spirit, tinged, no doubt, by the hatred to tyranny developed in the revolutionary struggle, tinged also by the nascent dislike to inequality, but in the main an English spirit, which desired to walk in the old paths of precedent, which thought of government as a means of maintaining order and securing to every one his rights, rather than as a great ideal power, capable of guiding and developing a nation's life. And thus, though the Constitution of 1789 represented a great advance on the still oligarchic system of contemporary England, it was yet, if we regard simply its legal provisions, the least democratic of democracies. Had the points which it left undetermined been dealt with in an aristocratic

[1] "That power might be abused," says Marshall in his *Life of Washington*, "was deemed a conclusive reason why it should not be conferred."

spirit, had the legislation of Congress and of the several States taken an aristocratic turn, it might have grown into an aristocratic system.[1] The democratic character which it now possesses is largely the result of subsequent events, which have changed the conditions under which it had to work, and have delivered its development into the hands of that passion for equality which has become a powerful factor in the modern world everywhere.

He who should desire to draw an indictment against the American scheme of government might make it a long one, and might for every count in it cite high American authority and adduce evidence from American history. Yet a European reader would greatly err were he to conclude that this scheme of government is a failure, or is, indeed, for the purposes of the country, inferior to the political system of any of the great nations of the Old World.

All governments are faulty; and an equally minute analysis of the constitutions of England, or France, or Germany would disclose mischiefs as serious, relatively to the problems with which those states have to deal, as those we have noted in the American system. To any one familiar with the practical working of free governments it is a standing wonder that they work at all. The first impulse of mankind is to follow and obey; servitude rather than freedom is their natural state. With freedom, when it emerges among the more progressive races, there come dissension and faction; and it takes many centuries to form those habits of compromise, that love of order, and that respect for public opinion which make democracy tolerable. What keeps

[1] The point most vital for determining the character of Congress, viz. the qualification of the electors, was left to the States. They have determined it by establishing manhood suffrage.

a free government going is the good sense and patriotism of the people, or of the guiding class, embodied in usages and traditions which it is hard to describe, but which find, in moments of difficulty, remedies for the inevitable faults of the system. Now, this good sense and that power of subordinating sectional to national interests which we call patriotism, exist in higher measure in America than in any of the great states of Europe. And the United States, more than any other country, are governed by public opinion, that is to say, by the general sentiment of the mass of the nation, which all the organs of the national government and of the State governments look to and obey.[1]

A philosopher from Jupiter or Saturn who should examine the constitution of England or that of America would probably pronounce that such a body of complicated devices, full of opportunities for conflict and deadlock, could not work at all. Many of those who examined the American constitution when it was launched did point to a multitude of difficulties, and confidently predicted its failure. Still more confidently did the European enemies of free government declare in the crisis of the War of Secession that "the republican bubble had burst." Some of these censures were well grounded, though there were also defects which had escaped criticism, and were first disclosed by experience. But the Constitution has lived on in spite of all defects, and seems stronger now than at any previous epoch.

Every Constitution, like every man, has "the defects of its good qualities." If a nation desires perfect stability it must put up with a certain slowness and cumbrousness; it must face the possibility of a want of

[1] The nature of public opinion and the way in which it governs are discussed in Part IV.

action where action is called for. If, on the other hand, it seeks to obtain executive speed and vigour by a complete concentration of power, it must run the risk that power will be abused and irrevocable steps too hastily taken. Those faults on which I have laid stress, the waste of power by friction, the want of unity and vigour in the conduct of affairs by executive and legislature, are the price which the Americans pay for the autonomy of their States, and for the permanence of the equilibrium among the various branches of their government. They pay this price willingly, because these defects are far less dangerous to the body politic than they would be in a European country. Take for instance the shortcomings of Congress as a legislative authority. Every European country is surrounded by difficulties which legislation must deal with, and that promptly. But in America, where those relics of mediæval privilege and injustice that still cumber most parts of the Old World either never existed, or were long ago abolished, where all the conditions of material prosperity exist in ample measure, and the development of material resources occupies men's minds, where nearly all social reforms lie within the sphere of State action, —in America there is less need and less desire than in Europe for a perennial stream of federal legislation. People are contented if things go on fairly well as they are. Political philosophers, or philanthropists, perceive some improvements which federal statutes might effect, but the mass of the nation does not complain. The barrenness of session after session is no such crying evil as the less conspicuous barrenness deplored by reformers in England.

"In matters of government," says Judge Cooley,[1]

[1] Address to the South Carolina Bar Association, Dec. 1886.

"America has become the leader and the example for all enlightened nations. England and France alike look across the ocean for lessons which may form and guide their people. Italy and Spain follow more distantly; and the liberty-loving people of every country take courage from American freedom, and find augury of better days for themselves from American prosperity. But America is not so much an example in her liberty as in the covenanted and enduring securities which are intended to prevent liberty degenerating into licence, and to establish a feeling of trust and repose under a beneficent government, whose excellence, so obvious in its freedom, is still more conspicuous in its careful provision for permanence and stability."

Every European state has to fear not only the rivalry but the aggression of its neighbours. Even Britain, so long safe in her insular home, has lost some of her security by the growth of steam navies, and has in her Indian and colonial possessions given pledges to Fortune all over the globe. She, like the Powers of the European Continent, must maintain her system of government in full efficiency for war as well as for peace, and cannot afford to let her armaments decline, her finances become disordered, the vigour of her executive authority be impaired, sources of internal discord continue to prey upon her vitals. But America lives in a world of her own, *ipsa suis pollens opibus, nihil indiga nostri.* Safe from attack, safe even from menace, she hears from afar the warring cries of European races and faiths, as the gods of Epicurus listened to the murmurs of the unhappy earth spread out beneath their golden dwellings,

"Sejuncta a rebus nostris semotaque longe."

Had Canada or Mexico grown to be a great power,

had France not sold Louisiana, or had England, rooted on the American continent, become a military despotism, the United States could not indulge the easy optimism which makes them tolerate the faults of their government. As it is, that which might prove to a European state a mortal disease is here nothing worse than a teasing ailment. Since the War of Secession ended, no serious danger has arisen either from within or from without to alarm transatlantic statesmen. Social convulsions from within, warlike assaults from without, seem now as unlikely to try the fabric of the American Constitution, as an earthquake to rend the walls of the Capitol. This is why the Americans submit, not merely patiently but hopefully, to the defects of their government. The vessel may not be any better built, or found, or rigged than are those which carry the fortunes of the great nations of Europe. She is certainly not better navigated. But for the present at least—it may not always be so—she sails upon a summer sea.

It must never be forgotten that the main object which the framers of the Constitution set before themselves has been achieved. When Sièyes was asked what he had done during the Reign of Terror, he answered, "I lived." The Constitution as a whole has stood and stands unshaken. The scales of power have continued to hang fairly even. The President has not corrupted and enslaved Congress: Congress has not paralysed and cowed the President. The legislative may have gained somewhat on the executive department; yet were George Washington to return to earth, he might be as great and useful a President as he was a century ago. Neither the legislature nor the executive has for a moment threatened the liberties of the people. The States have not broken up the Union, and the Union

has not absorbed the States. No wonder that the Americans are proud of an instrument under which this great result has been attained, which has passed unscathed through the furnace of civil war, which has been found capable of embracing a body of commonwealths three times as numerous, and with twenty-fold the population of the original States, which has cultivated the political intelligence of the masses to a point reached in no other country, which has fostered and been found compatible with a larger measure of local self-government than has existed elsewhere. Nor is it the least of its merits to have made itself beloved. Objections may be taken to particular features, and these objections point, as most American thinkers are agreed, to practicable improvements which would preserve the excellences and remove some of the inconveniences. But reverence for the Constitution has become so potent a conservative influence, that no proposal of fundamental change seems likely to be entertained. And this reverence is itself one of the most wholesome and hopeful elements in the character of the American people.

CHAPTER XXVII

THE FEDERAL SYSTEM

HAVING examined the several branches of the National government and the manner in which they work together, we may now proceed to examine the American Commonwealth as a Federation of States. The present chapter is intended to state concisely the main features which distinguish the Federal system, and from which it derives its peculiar character. Three other chapters will describe its practical working, and summarize the criticisms that may be passed upon it.

The contests in the Convention of 1787 over the framing of the Constitution, and in the country over its adoption, turned upon two points: the extent to which the several States should be recognized as independent and separate factors in the construction of the National government, and the quantity and nature of the powers which should be withdrawn from the States to be vested in that government. It has been well remarked that "the first of these, the definition of the structural powers, gave more trouble at the time than the second, because the line of partition between the powers of the States and the Federal government had been already fixed by the whole experience of the country."[1] But

[1] I quote from an acute and concise essay on this subject by Mr.

since 1791 there has been practically no dispute as to the former point, and little as to the propriety of the provisions which define the latter. On the interpretation of these provisions there has, of course, been endless debate, some deeming the Constitution to have taken more from the States, some less; while still warmer controversies have raged as to the matters which the instrument does not expressly deal with, and particularly whether the States retain their sovereignty, and with it the right of nullifying or refusing to be bound by certain acts of the national government, and in the last resort of withdrawing from the Union. As these latter questions (nullification and secession) have now been settled by the Civil War, we may say that in the America of to-day there exists a general agreement—

That every State on entering the Union finally renounced its sovereignty, and is now for ever subject to the Federal authority as defined by the Constitution.

That the functions of the States as factors of the national government are satisfactory, *i.e.* sufficiently secure its strength and the dignity of these communities.

That the delimitation of powers between the national government and the States, contained in the Constitution, is convenient, and needs no fundamental alteration.[1]

The ground which we have to tread during the remainder of this chapter is therefore no longer controversial ground, but that of well-established law and practice.[2]

Richard M. Venable of Baltimore, entitled "The Partition of Powers between the Federal and State Governments," being a paper read at the 1885 meeting of the American Bar Association.

[1] The view that the power of Congress to legislate might properly be extended, by a constitutional amendment, to such a subject as marriage and divorce, is of course compatible with an acquiescence in the general scheme of delimitation of powers.

[2] A remarkably clear view of the limits of Federal and State authority

I. The distribution of powers between the National and the State governments is effected in two ways, Positively, by conferring certain powers on the National government, Negatively, by imposing certain restrictions on the States. It would have been superfluous to confer any powers on the States, because they retain all powers not actually taken from them. A lawyer may think that it was equally unnecessary and, so to speak, inartistic, to lay any prohibitions on the National government, because it could *ex hypothesi* exercise no powers not expressly granted. However, the anxiety of the States to fetter the master they were giving themselves caused the introduction of provisions qualifying the grant of express powers, and interdicting the National government from various kinds of action on which it might otherwise have been tempted to enter.[1] The matter is further complicated by the fact that the grant of power to the National government is not in all cases an exclusive grant: *i.e.* there are matters which both, or either, the States and the National government may deal with. "The mere grant of a power to Congress does not of itself, in most cases, imply a prohibition upon the States to exercise the like power. . . . It is not the mere existence of the National

may be found in the treatise of Mr. C. S. Patterson (published since this chapter was written), *Federal Restraints on State Action*: Philadelphia, 1888.

[1] Judge Cooley observes to me, "The prohibitions imposed by the Federal Constitution on the exercise of power by the general government were not, for the most part, to prevent its encroaching on the powers left with the States, but to preclude tyrannical exercise of powers which were unquestionably given to the Federal government. Thus Congress was forbidden to pass any bill of attainder; this was to prevent its dealing with Federal offences by legislative conviction and sentence. It was forbidden to pass *ex post facto* laws, and this undoubtedly is a limitation upon power granted; for with the same complete power in respect to offences against the general government which a sovereignty possesses, it might have passed such laws if not prohibited."

power but its exercise which is incompatible with the exercise of the same power by the States."[1] Thus we may distinguish the following classes of governmental powers :—

Powers vested in the National government alone.

Powers vested in the States alone.

Powers exercisable by either the National government or the States.

Powers forbidden to the National government.

Powers forbidden to the State governments.

It might be thought that the two latter classes are superfluous, because whatever is forbidden to the National government is permitted to the States, and conversely, whatever is forbidden to the States is permitted to the National government. But this is not so. For instance, Congress can grant no title of nobility (Art. i. § 9). But neither can a State do so (Art. i. § 10). The National government cannot take private property for public use without just compensation (Amendment v.) Apparently neither can any State do so (Amendment xiv. as interpreted in several cases). So no State can pass any law impairing the obligation of a contract (Art. i. § 10). But the National government, although not subject to a similar direct prohibition, has received no general power to legislate as regards ordinary contracts, and might therefore in some cases find itself equally unable to pass a law which a State legislature, though for a different reason, could not pass.[2] So no State can pass any *ex post facto* law. Neither can Congress.

[1] Cooley, *Principles*, p. 35 ; cf. *Sturges* v. *Crowninshield*, 4 Wheat. 122.

[2] Of course Congress can legislate regarding some contracts, and can impair their obligation. It has power to regulate commerce, it can pass bankrupt laws, it can make paper money legal tender.

What the Constitution has done—and this is to Englishmen one of its most singular features—is not to cut in half the totality of governmental functions and powers, giving part to the national government and leaving all the rest to the States, but to divide up this totality of authority into a number of parts which do not exhaust the whole, but leave a residuum of powers neither granted to the Union nor continued to the States but reserved to the people, who, however, can put them in force only by the difficult process of amending the Constitution. In other words, there are things in America which there exists no organized and permanent authority capable of legally doing, not a State, because it is expressly forbidden, not the national government, because it either has not received the competence or has been expressly forbidden. Suppose, for instance, that there should arise a wish to pass for California such a measure as the Irish Land Act passed by the British Parliament in 1881, or the Irish Land Act passed by that body in 1887. Neither the State legislature of California, nor the people of California assembled in a constitutional convention, could pass such a measure, because it would violate the obligation of contracts, and thereby transgress Art. i. § 10 of the Federal Constitution. Whether the Federal Congress could pass such a measure is at least extremely doubtful, because the Constitution, though it has imposed no prohibition such as that which restricts a State, does not seem to have conferred on Congress the right of legislating on such a matter at all.[1] If, therefore, an absolute and overwhelming neces-

[1] It may of course be suggested that in case of urgent public necessity, such as the existence of war or insurrection, Congress might extinguish debts either generally or in a particular district. No such legislative power

sity for the enactment of such a measure should arise, the safer if not the only course would be to amend the Federal Constitution, either by striking out the prohibition on the States or by conferring the requisite power on Congress, a process which would probably occupy more than a year, and which requires the concurrence of two-thirds of both Houses of Congress and of three-fourths of the thirty-eight States.

II. The powers vested in the National government alone are such as relate to the conduct of the foreign relations of the country and to such common national purposes as the army and navy, internal commerce, currency, weights and measures, and the post-office, with provisions for the management of the machinery, legislative executive and judicial, charged with these purposes.[1]

The powers which remain vested in the States alone are all the other ordinary powers of internal government, such as legislation on private law, civil and criminal, the maintenance of law and order, the creation of local institutions, the provision for education and the relief of the poor, together with taxation for the above purposes.

III. The powers which are exercisable concurrently by the National government and by the States are—

Powers of legislation on some specified subjects, such as bankruptcy and certain commercial matters (*e.g.* pilot laws and harbour regulations), but so that State legislation shall take effect only in the absence of Federal legislation.

seems, however, to have been exerted or declared by the courts to exist, unless the principles of the last Legal Tender decision can be thought to reach so far.

[1] See Art. i. § 8, Art. ii. § 2, Art. iii. § 2, Art. iv. §§ 3 and 4; Amendments xiii., xiv., xv. of the Constitution.

Powers of taxation, direct or indirect, but so that neither Congress nor a State shall tax exports from any State, and so that neither any State shall, except with the consent of Congress, tax any corporation or other agency created for Federal purposes or any act done under Federal authority, nor the National government tax any State or its agencies or property.

Judicial powers in certain classes of cases where Congress might have legislated, but has not, or where a party to a suit has a choice to proceed either in a Federal or a State court.

Powers of determining matters relating to the election of representatives and senators (but if Congress determines, the State law gives way).

IV. The prohibitions imposed on the National government are set forth in Art. i. § 9, and in the first ten amendments. The most important are—

Writ of habeas corpus may not be suspended, nor bill of attainder or *ex post facto* law passed.[1]

No commercial preference shall be given to one State over another.

No title of nobility shall be granted.

No law shall be passed establishing or prohibiting any religion, or abridging the freedom of speech or of the press, or of public meeting, or of bearing arms.

No religious test shall be required as a qualification for any office under the United States.

No person shall be tried for a capital crime unless on the presentment of a grand jury, or be subjected to a second capital trial for the same offence, or be compelled

[1] Limitations of a nature generally similar to these are now pretty frequent in recent European Constitutions, *e.g.* in that of Belgium.

The term *ex post facto* law is deemed to refer to criminal laws only.

to be a witness against himself, or be tried otherwise than by a jury of his State and district.

No common law action shall be decided except by a jury where the value in dispute exceeds $20, and no fact determined by a jury shall be re-examined otherwise than by the rules of the common law.[1]

V. The prohibitions imposed on the States are contained in Art. i. § 10, and in the three last amendments. They are intended to secure the National government against attempts by the States to trespass on its domain, and to protect individuals against oppressive legislation.

No State shall make any treaty or alliance: coin money: make anything but gold and silver coin a legal tender: pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts: grant any titles of nobility.

No State shall without the consent of Congress—Lay duties on exports or imports (the produce of such, if laid, going to the national treasury): keep troops or ships of war in peace time: enter into an agreement with another State or with any foreign power: engage in war, unless actually invaded or in imminent danger.

Every State must—Give credit to the records and judicial proceedings of every other State: extend the privileges and immunities of citizens to the citizens of other States: deliver up fugitives from justice to the State entitled to claim them.

No State shall have any but a republican form of government.

No State shall maintain slavery: abridge the privileges of any citizen of the United States, or deny to

[1] Chiefly intended to prevent the methods of courts of equity from being applied in the Federal courts as against the findings of a jury.

him the right of voting, in respect of race, colour, or previous servitude: deprive any person of life, liberty, or property without due process of law: deny to any person the equal protection of the laws.

Note that this list contains no prohibition to a State to do any of the following things:—Establish a particular form of religion: endow a particular form of religion, or educational or charitable establishments connected therewith: abolish trial by jury in criminal or civil cases: suppress the freedom of speaking, writing, and meeting (provided that this be done equally as between different classes of citizens, and provided also that it be not done to such an extent as to amount to a deprivation of liberty without due process of law): limit the electoral franchise to any extent: extend the electoral franchise to women, minors, aliens.

These omissions are significant. They show that the framers of the Constitution had no wish to produce uniformity among the States in government or institutions, and little care to protect the citizens against abuses of State power.[1] Their chief aim was to secure the National government against encroachments on the part of the States, and to prevent causes of quarrel both between the central and State authorities and between the several States. The result has, on the whole, justified their action. So far from abusing their power of making themselves unlike one another, the States have tended to be too uniform, and have made fewer experiments in institutions than one could wish.

VI. The powers vested in each State are all of them

[1] The fourteenth and fifteenth amendments are in this respect a novelty. The only restrictions of this kind to be found in the instrument of 1789 are those relating to contracts and *ex post facto* laws. Of course the rights of State citizens were adequately protected already by the provisions of State constitutions.

original and inherent powers, which belonged to the State before it entered the Union.[1] Hence they are *prima facie* unlimited, and if a question arises as to any particular power, it is presumed to be enjoyed by the State, unless it can be shown to have been taken away by the Federal Constitution; or, in other words, a State is not deemed to be subject to any restriction which the Constitution has not distinctly imposed.

The powers granted to the National government are delegated powers, enumerated in and defined by the instrument which has created the Union. Hence the rule that when a question arises whether the national government possesses a particular power, proof must be given that the power was positively granted. If not granted, it is not possessed, because the Union is an artificial creation, whose government can have nothing but what the people have by the Constitution conferred. The presumption is therefore against the national government in such a case, just as it is for the State in a like case.[2]

VII. The authority of the National government over the citizens of every State is direct and immediate, not exerted through the State organization, and not requiring the co-operation of the State government. For most purposes the National government ignores the States;

[1] When I speak of a State, I do not mean merely a State legislature, because that body is usually restrained by the State constitution from exercising the totality of the powers which the State possesses, but include the people of the State assembled in convention, or voting on a State constitution or on an amendment proposed thereto.

[2] Congress must not attempt to interfere with the so-called "police power" of the States within their own limits. So when a statute of Congress had made it punishable to sell certain illuminating fluids inflammable at less than a certain specified temperature, it was held that this statute could not operate within a State, but only in the District of Columbia and the Territories, and a person convicted under it in Detroit was discharged (*United States* v. *De Witt*, 9 Wall. 41).

and it treats the citizens of different States as being simply its own citizens, equally bound by its laws. The Federal courts, revenue officers, and post-office draw no help from any State officials, but depend directly on Washington. Hence, too, of course, there is no local self-government in Federal matters. No Federal official is elected by the people of any local area. Local government is purely a State affair.

On the other hand, the State in no wise depends on the National government for its organization or its effective working. It is the creation of its own inhabitants. They have given it its constitution. They administer its government. It goes on its own way, touching the national government at but few points. That the two should touch at the fewest possible points was the intent of those who framed the Federal Constitution, for they saw that the less contact, the less danger of collision. Their aim was to keep the two mechanisms as distinct and independent of each other as was compatible with the still higher need of subordinating, for national purposes, the State to the Central government.[1]

VIII. It is a further consequence of this principle that the National government has but little to do with the States as States. Its relations are with their citizens, who are also its citizens, rather than with them as ruling commonwealths. In the following points, however, the Constitution does require certain services of the States:—

It requires each State government to direct the choice of, and accredit to the seat of the national government, two senators and so many representatives as the State is entitled to send.

[1] For a comparison of the Federal system of the United States with the Federal system of the two ancient English Universities, see note to this chapter printed at the end of the volume.

It requires similarly that presidential electors be chosen meet and vote in the States, and that their votes be transmitted to the national capital.

It requires each State to organize and arm its militia, which, when duly summoned for active service, are placed under the command of the President.

It requires each State to maintain a republican form of government.[1]

Note in particular that the National government does not, as in some other federations—

Call upon the States, as commonwealths, to contribute funds to its support:

Issue (save in so far as may be needed in order to secure a republican form of government) administrative orders to the States, directing their authorities to carry out its laws or commands:

Require the States to submit their laws to it, and veto such as it disapproves.

The first two things it is not necessary for the National government to do, because it levies its taxes directly by its own collectors, and enforces its laws, commands, and judicial decrees by the hands of its own servants. The last can be dispensed with because the State laws are *ipso jure* invalid, if they conflict with the Constitution or any treaty or law duly made under it (Art. vi. § 2), while if they do not so conflict they are valid whether the National government should approve of them or not.

Neither does the National government allow its structure to be dependent on the action of the States. "To make it impossible for a State or group of States to jeopard by inaction or hostile action the existence of the

[1] Conversely, the National government may be required by any State to afford protection against invasion and against domestic violence.

central government,"[1] was a prime object with the men of 1787, and has greatly contributed to the solidity of the fabric they reared. The *de facto* secession of eleven States in 1860-61 interfered with the regular legal conduct neither of the presidential election of 1864 nor of the congressional elections from 1861 to 1865. Those States were not represented in Congress; but Congress itself went on diminished in numbers yet with its full legal powers, as the British Parliament would go on though all the peers and representatives from Scotland might be absent.

IX. A State is, within its proper sphere, just as legally supreme, just as well entitled to give effect to its own will, as is the National government within its sphere; and for the same reason. All authority flows from the people. The people have given part of their supreme authority to the Central, part to the State governments. Both hold by the same title, and therefore the National government, although superior wherever there is a concurrence of powers, has no more right to trespass upon the domain of a State than a State has upon the domain of Federal action. "When a particular power," says Judge Cooley, "is found to belong to the States, they are entitled to the same complete independence in its exercise as is the National government in wielding its own authority." That the course which a State is following is pernicious, that its motives are bad and its sentiments disloyal to the Union, makes no difference until or unless it infringes on the sphere of Federal authority. It may be thought that however distinctly this may have been laid down as a matter of theory, in practice the State will not obtain the same justice as the National government, because the court which decides

[1] Venable, *ut supra*.

points of law in dispute between the two is in the last resort a Federal court, and therefore biassed in favour of the Federal government. In practice, however, little or no unfairness has arisen from this cause.[1] The Supreme court may, as happened for twenty years before the War of Secession, be chiefly composed of States' Rights men. In any case the court cannot stray far from the path which previous decisions have marked out.

X. There are several remarkable omissions in the constitution of the American federation.

One is that there is no grant of power to the National government to coerce a recalcitrant or rebellious State. Another is that nothing is said as to the right of secession. Any one can understand why this right should not have been granted. But neither is it mentioned to be negatived.

There is no abstract or theoretic declaration regarding the nature of the federation and its government, nothing as to the ultimate supremacy of the central authority outside the particular sphere allotted to it, nothing as to the so-called sovereign rights of the States. As if with a prescience of the dangers to follow, the wise men of 1787 resolved to give no opening for abstract inquiry and metaphysical dialectic. But in vain. The human mind is not to be so restrained. If the New Testament had consisted of no other writings than the Gospel of St. Matthew and the Epistle of St. James, there would have been scarcely the less a crop of specu-

[1] "Whatever fluctuations may be seen in the history of public opinion during the period of our national existence, we think it will be found that the Supreme court, so far as its functions required, has always held with a steady and even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution."—Judgment of the Supreme court in *The Slaughter House Cases*, 16 Wall. 82.

lative theology. The drily legal and practical character of the Constitution did not prevent the growth of a mass of subtle and, so to speak, scholastic metaphysics regarding the nature of the government it created. The inextricable knots which American lawyers and publicists went on tying, down till 1861, were cut by the sword of the North in the Civil War, and need concern us no longer. It is now admitted that the Union is not a mere compact between commonwealths, dissoluble at pleasure, but an instrument of perpetual efficacy,[1]

[1] This view received judicial sanction in the famous case of *Texas* v. *White* (7 Wall. 700) decided by the Supreme court after the war. It is there said by Chief-Justice Chase, "The Union of the States never was a purely artificial and arbitrary relation. . . . It received definite form and character and sanction by the Articles of Confederation. By these the Union was solemnly declared to be 'perpetual.' And where these articles were found to be inadequate to the exigencies of the country, the Constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual union, made more perfect, is not? But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government, by the States. . . . It may be not unreasonably said that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States. When, therefore, Texas became one of the United States she entered into an indissoluble relation. . . . There was no place for reconsideration or revocation except through revolution or through consent of the States. Considered therefore as transactions under the Constitution, the ordinance of secession adopted by the Convention, and ratified by a majority of the citizens of Texas, was absolutely null and utterly without operation in law. The obligations of the State as a member of the Union, and of every citizen of the State as a citizen of the United States, remained perfect and unimpaired." The State did not cease to be a State, nor her citizens to be citizens of the Union. See also the cases of *White* v. *Hart* (13 Wall. 646) and *Keith* v. *Clark* (97 U. S. 451).

As respects the argument that the Union established by the Constitution of 1789 must be perpetual, because it is declared to have been designed to make a previous perpetual Union more perfect, it may be remarked, as matter of history, that this previous Union (that resting on the Articles of Confederation) had not proved perpetual, but was in fact put an end to by the acceptance in 1788 of the new Constitution by the nine States who first

emanating from the whole people, and alterable by them only in the manner which its own terms prescribe. It is "an indestructible Union of indestructible States."

It follows from the recognition of the indestructibility of the Union that there must somewhere exist a force capable of preserving it. The National government is now admitted to be such a force. "It can exercise all powers essential to preserve and protect its own existence and that of the States, and the constitutional relation of the States to itself, and to one another."[1]

"May it not," some one will ask, "abuse these powers, abuse them so as to extinguish the States themselves, and turn the federation into a unified government. What is there but the Federal judiciary to prevent this catastrophe? and the Federal judiciary has only moral and not also physical force at its command."

No doubt it may, but not until public opinion supports it in so doing, that is to say, not until the mass of the nation which now maintains, because it values, the Federal system, is possessed by a desire to overthrow that system. Such a desire may express

ratified that instrument. After that ratification the Confederation was dead, and the States of North Carolina and Rhode Island, which for some months refused to come into the new Union, were clearly out of the old one, and stood alone in the world. May it not then be said that those who destroyed a Union purporting to be perpetual were thereafter estopped from holding it to have been perpetual, and from founding on the word 'perpetual' an argument against those who tried to upset the new Union in 1861, as the old one had been upset in 1788. The answer to this way of putting the point seems to be to admit that the proceedings of 1788 were in fact revolutionary. In ratifying their new Constitution in that year, the nine States broke through and flung away their previous compact which purported to have been made for ever. But they did so for the sake of forming a better and more enduring compact, and their extra-legal action was amply justified by the necessities of the case.

An elaborate discussion of the legal relation of the States to the Union will be found in the learned treatise of Mr. Hurd, *The Theory of our National Existence:* Boston, 1881.

[1] Venable, *ut supra.*

itself in proper legal form by carrying amendments to the Constitution which will entirely change the nature of the government. Or if the minority be numerous enough to prevent the passing of such amendments, and if the desire of the majority be sufficiently vehement, the majority which sways the National government may disregard legal sanctions and effect its object by a revolution. In either event—and both are improbable—the change which will have passed upon the sentiments of the American people will be a sign that Federalism has done its work, and that the time has arrived for new forms of political life.

CHAPTER XXVIII

WORKING RELATIONS OF THE NATIONAL AND THE STATE GOVERNMENTS

THE characteristic feature and special interest of the American Union is that it shows us two governments covering the same ground yet distinct and separate in their action. It is like a great factory wherein two sets of machinery are at work, their revolving wheels apparently intermixed, their bands crossing one another, yet each set doing its own work without touching or hampering the other. To keep the National government and the State governments each in the allotted sphere, preventing collision and friction between them, was the primary aim of those who formed the Constitution, a task the more needful and the more delicate because the States had been until then almost independent and therefore jealous of their privileges, and because, if friction should arise, the National government could not remove it by correcting defects in the machinery. For the National government had not been made supreme and omnipotent. It was itself the creature of the Constitution. It was not permitted to amend the Constitution, but could only refer it back for amendment to the people of the States or to their legislatures. Hence the men of 1787, feeling the cardinal importance of anticipating and avoiding

occasions of collision, sought to accomplish their object by the concurrent application of two devices. One was to restrict the functions of the National government to the irreducible minimum of functions absolutely needed for the national welfare, so that everything else should be left to the States. The other was to give that government, so far as those functions extended, a direct and immediate relation to the citizens, so that it should act on them not through the States but of its own authority and by its own officers. These are fundamental principles whose soundness experience has approved, and which well deserve to be considered by those who in time to come may have in other countries to frame federal or quasi-federal constitutions. They were studied, and to a large extent, though in no slavish spirit, adopted by the founders of the present constitution of the Swiss Confederation, a constitution whose success bears further witness to the soundness of the American doctrines.

The working relations of the National government to the States may be considered under two heads, viz. its relations to the States as corporate bodies, and its relations to the citizens of the States as individuals, they being also citizens of the Union.

The National government touches the States as corporate commonwealths in three points. One is their function in helping to form the National government; another is the control exercised over them by the Federal Constitution through the Federal courts; the third is the control exercised over them by the Federal Legislature and Executive in the discharge of the governing functions which these latter authorities possess.

I. The States serve to form the National government by choosing presidential electors, by choosing senators, and by fixing the franchise which qualifies citizens to vote

for members of the House of Representatives.[1] No difficulty has ever arisen (except during the Civil War) from any unwillingness of the States to discharge these duties, for each State is eager to exercise as much influence as it can on the national executive and Congress. But note how much latitude has been left to the States. A State may appoint its presidential electors in any way it pleases. All States now do appoint them by popular vote. But during the first thirty years of the Union many States left the choice of electors to their respective legislatures. So a State may, by its power of prescribing the franchise for its State elections, prescribe whatever franchise it pleases for the election of its members of the Federal House of Representatives, and may thus admit persons who would in other States be excluded from the suffrage, or exclude persons who would in other States be admitted. For instance, thirteen States now allow aliens (*i.e.* foreigners not yet naturalized) to vote; and any State which should admit women to vote at its own State elections would thereby admit them also to vote at congressional elections.[2] The only restriction imposed on State discretion in this respect is that of the fifteenth amendment, which forbids any person to be deprived of suffrage, on "account of race, colour, or previous condition of servitude."[3]

II. The Federal Constitution deprives the States of certain powers they would otherwise enjoy. Some of

[1] Congress may, if it pleases, regulate by statute the times, places, and manner of holding elections for representatives (Const., Art. i. § 4.)

[2] So in some States tribal Indians are permitted to vote. It is odd that the votes of persons who are not citizens of the United States might, in a State where parties are nearly equal, turn the choice of presidential electors in that State, and thereby perhaps turn the presidential election in the Union.

[3] The Constitutions of some States retain the old exclusion of negroes from the suffrage, and two exclude natives of China; but these provisions are overridden by the fifteenth constitutional amendment.

these, such as that of making treaties, are obviously unpermissible, and such as the State need not regret.[1] Others, however, seriously restrain their daily action. They are liable to be sued in the Federal courts by another State or by a foreign Power. They cannot, except with the consent of Congress, tax exports or imports, or in any case pass a law impairing the obligation of a contract. They must surrender fugitives from the justice of any other State. Whether they have transgressed any of these restrictions is a question for the courts of law, and, if not in the first instance, yet always in the last resort a question for the Federal Supreme court. If it is decided that they have transgressed, their act, be it legislative or executive, is null and void.[2]

The President as national executive, and Congress as national legislature, have also received from the Constitution the right of interfering in certain specified matters with the governments of the States. Congress of course does this by way of legislation, and when an Act of Congress, made within the powers conferred by the Constitution, conflicts with a State statute, the

[1] As the States had not been accustomed to act as sovereign commonwealths in international affairs, they yielded this right to the National government without demur; whereas Swiss history shows the larger cantons to have been unwilling to drop the practice of sending their own envoys to foreign powers and making bargains on their own behalf.

[2] Mr. Justice Miller observes (*Centennial Address at Philadelphia*) that "at no time since the formation of the Union has there been a period when there were not to be found on the statute books of some of the States acts passed in violation of the provisions of the Constitution regarding commerce, acts imposing taxes and other burdens upon the free interchange of commodities, discriminating against the productions of other States, and attempting to establish regulations of commerce, which the Constitution says shall only be done by Congress." All such acts are of course held invalid by the courts when questioned before them.

It has very recently been held that a State cannot forbid a common carrier to bring into its jurisdiction intoxicating liquors from another State (*Bowman* v. *C. & N. W. Rly.* 125 U.S.)

former prevails against the latter. It prevails by making the latter null and void, so that if a State statute has been duly passed upon a matter not forbidden to a State by the Constitution, and subsequently Congress passes an act on the same matter, being one whereon Congress has received the right to legislate, the State statute, which was previously valid, now becomes invalid to the extent to which it conflicts with the Act of Congress. For instance, Congress has power to establish a uniform law of bankruptcy over the whole Union. It has formerly, in the exercise of this power, passed bankruptcy laws; but these have been repealed, and at present the subject is left to the State laws, which are accordingly in full force in the several States.[1] Were Congress again to legislate on the subject, these State laws would lose their force;[2] and if the law passed by Congress were again repealed, they would again spring into life. The field of this so-called concurrent legislation is large, for Congress has not yet exercised all the powers vested in it of superseding State action.

It was remarked in last chapter that in determining the powers of Congress on the one hand and of a State government on the other, opposite methods have to be followed. The presumption is always in favour of the State; and in order to show that it cannot legislate on a subject, there must be pointed out within the four corners of the Constitution some express prohibition of the right which it *prima facie* possesses, or some implied prohibition arising from the fact that legislation by it

[1] The lawyer may refer on this subject to the interesting case of *Sturges* v. *Crowninshield*, 4 Wheat. 196.

[2] And in this instance they would lose their force altogether, because the power of Congress being to establish a "uniform" law, the continued existence of statutes differing in the different States would prevent the law of bankruptcy from being uniform over the Union.

would conflict with legitimate federal authority.[1] On the other hand, the presumption is always against Congress, and to show that it can legislate, some positive grant of power to Congress in the Constitution must be pointed out.[2] When the grant is shown, then the Act of Congress has, so long as it remains on the statute book, all the force of the Constitution itself. In some instances the grant of power to Congress to legislate is auxiliary to a prohibition imposed on the States. This is notably the case as regards the amendments to the Constitution, passed for the protection of the lately liberated negroes. They interdict the States from either recognizing slavery, or discriminating in any way against any class of citizens; they go even beyond citizens in their care, and declare that "no State shall deny to any person within its jurisdiction the equal protection of the laws." Now, by each of these amendments, Congress is also empowered, which practically means enjoined, to "enforce by appropriate legislation" the prohibitions laid upon the States. Congress has done so, but some of its efforts have been held to go beyond the directions of the amendments, and to be therefore void.[3] The grant of power has not covered them.

Where the President interferes with a State, he does so either under his duty to give effect to the legislation of Congress, or under the discretionary executive functions

[1] Otherwise in the Federal Constitution of Canada. See Note to Chapter XXX.

[2] The grant need not, however, be express, for it has frequently been held that a power incidental or instrumental to a power expressly given may be conferred upon Congress by necessary implication. See *M'Culloch* v. *Maryland*, 4 Wheat. p. 316, and *post*, Chapter XXXIII.

[3] See the Appendix (by Judge Cooley) to the last edition of Story's *Commentaries*, and the cases on the three last amendments collected in Desty's *Constitution of the United States Annotated*.

which the Constitution has entrusted to him. So if any State were to depart from a republican form of government, it would be his duty to bring the fact to the notice of Congress in order that the guarantee of that form contained in the Constitution might be made effective. If an insurrection broke out against the authority of the Union, he would (as in 1861) send Federal troops to suppress it. If there should be rival State governments, each claiming to be legitimate, the President might, especially if Congress were not sitting, recognize and support the one which he deemed regular and constitutional.[1]

Are these, it may be asked, the only cases in which Federal authority can interfere within the limits of a State to maintain order? Are law and order, *i.e.* the punishment of crimes and the enforcement of civil rights, left entirely to State authorities? The answer is:—

Offences against Federal statutes are justiciable in Federal courts, and punishable under Federal authority. There is no Federal common law of crimes.

Resistance offered to the enforcement of a Federal statute may be suppressed by Federal authority.

Attacks on the property of the Federal government may be repelled, and disturbances thence arising may be quelled by Federal authority.

The judgments pronounced in civil causes by Federal courts are executed by the officers of these courts.

All other offences and disorders whatsoever are left

[1] In 1874-75 a contest having arisen in Louisiana between two governments each claiming to be the legal government of the State, Federal military aid was supplied to one of them by the President and his action was afterwards approved by Congress. It has been doubted, however, whether the case could properly be deemed one of "domestic violence" within the meaning of Art. iv. § 4 of the Constitution.

to be dealt with by the duly constituted authorities of the State, who are, however, entitled in one case to summon the power of the Union to their aid.

This case is that of the breaking out in a State of serious disturbances. The President is bound on the application of the State legislature or executive to quell such disturbances by the armed forces of the Union, or by directing the militia of another State to enter. Thus in 1794 Washington suppressed the so-called Whisky Insurrection in Pennsylvania by the militia of Pennsylvania, New Jersey, Virginia, and Maryland.[1] President Grant was obliged to use military force during the troubles which disturbed several of the Southern States after the Civil War; as was President Hayes, during the tumults in Pennsylvania caused by the great railway strikes of 1877. There have, however, been cases, such as the Dorr rebellion in Rhode Island in 1842,[2] in which a State has itself suppressed an insurrection against its legitimate government. It is the duty of a State to do so if it can, and to seek Federal aid only in extreme cases, when resistance is formidable.

So far we have been considering the relations of the National government to the States as political communities. Let us now see what are its relations to the individual citizens of these States. They are citizens of the Union as well as of the States, and owe allegiance to both powers. Each power has a right to command

[1] See Hildreth's *History of the United States*, iv. p. 504. This was the first assertion by arms of the supreme authority of the Union, and produced an enormous effect upon opinion.

[2] President Tyler ordered the militia of Connecticut and Massachusetts to be prepared to enter Rhode Island and suppress the rebellion, but the Rhode Island militia proved equal to the occasion and succeeded in suppressing Dorr. Instances of Federal intervention have been very rare.

their obedience. To which then, in case of conflict, is obedience due?

The right of the State to obedience is wider in the area of matters which it covers. *Prima facie*, every State law, every order of a competent State authority, binds the citizen, whereas the National government has but a limited power: it can legislate or command only for certain purposes or on certain subjects. But within the limits of its power, its authority is higher than that of the State, and must be obeyed even at the risk of disobeying the State. A recent instance in which a State official suffered for obeying his State where its directions clashed with a provision of the Federal Constitution may set the point in a clear light. A statute of California had committed to the city and county authority of San Francisco the power of making regulations for the management of gaols. This authority had in 1876 passed an ordinance directing that every male imprisoned in the county gaol should "immediately on his arrival have his hair clipped to a uniform length of one inch from the scalp." The sheriff having, under this ordinance, cut off the queue of a Chinese prisoner, Ho Ah Kow, was sued for damages by the prisoner, and the court, holding that the ordinance had been passed with a special view to the injury of the Chinese, who consider the preservation of their queue a matter of religion as well as of honour, and that it operated unequally and oppressively upon them, in contravention of the fourteenth amendment to the Constitution of the United States, declared the ordinance invalid, and gave judgment against the sheriff.[1] Similar

[1] Case of *Ho Ah Kow* v. *Matthew Nunan* (July 1879), 5 Sawyer, *Circuit Court Reports*, p. 552. A similar ordinance had been some years before courageously vetoed by Mr. Alvord, then mayor of San Francisco.

subsequent attempts against the Chinese, made under cover of the constitution of California of 1879 and divers statutes passed thereunder, have been defeated by the courts.

The safe rule for the private citizen may be thus expressed: "Ascertain whether the Federal law is constitutional (*i.e.* such as Congress has power to pass). If it is, conform your conduct to it at all hazards. If it is not, disregard it, and obey the law of your State." This may seem hard on the private citizen. How shall he settle for himself such a delicate point of law as whether Congress had power to pass a particular statute, seeing that the question may be doubtful and not have come before the courts? But in practice little inconvenience arises, for Congress and the State legislatures have learnt to keep within their respective spheres, and the questions that arise between them are seldom such as need disturb an ordinary man.

The same remarks apply to conflicts between the commands of executive officers of the National government on the one hand, and those of State officials on the other. If the national officer is acting within his constitutional powers, he is entitled to be obeyed in preference to a State official, and conversely, if the State official is within his powers, and the national officer acting in excess of those which the Federal Constitution confers, the State official is to be obeyed.

The limits of judicial power are more difficult of definition. Every citizen can sue and be sued or indicted both in the courts of his State and in the Federal courts, but in some classes of cases the former, in others the latter, is the proper tribunal, while in many it is left to the choice of the parties before which tribunal they will proceed. Sometimes a plaintiff who has

brought his action in a State court finds when the case has gone a certain length that a point of Federal law turns up which entitles either himself or the defendant to transfer it to a Federal court, or to appeal to such a court should the decision have gone against the applicability of the Federal law. Suits are thus constantly transferred from State courts to Federal courts, but you can never reverse the process and carry a suit from a Federal court to a State court. Within its proper sphere of pure State law, and of course the great bulk of the cases turn on pure State law, there is no appeal from a State court to a Federal court; and though the point of law on which the case turns may be one which has arisen and been decided in the Supreme court of the Union, a State judge, in a State case, is not bound to regard that decision. It has only a moral weight, such as might be given to the decision of an English court, and where the question is one of State law, whether common law or statute law, in which State courts have decided one way and a Federal court the other way, the State judge ought to follow his own courts. So far does this go, that a Federal court in administering State law, ought to reverse its own previous decision rather than depart from the view which the highest State court has taken.[1] All this seems extremely complex. I can only say that it is less troublesome in practice than could have been expected, because American lawyers are accustomed to the intricacies of their system.

When a plaintiff has the choice of proceeding in a State court or in a Federal court, he is sometimes,

[1] This is especially the rule in cases involving the title to land. See Cooley, *Principles*, p. 131. But though the theory is as stated in the text, the Federal courts not unfrequently act upon their own view of the State law, and have sometimes been accused of going so far as to create a sort of Federal common law.

especially if he has a strong case, inclined to select the latter, because the Federal judges are more independent than those of most of the States, and less likely to be influenced by any bias. So, too, if he thinks that local prejudice may tell against him, he will prefer a Federal court, because the jurors are summoned from a wider area, and because the judges are accustomed to exert a larger authority in guiding and controlling the jury. But it is usually more convenient to sue in a State court, seeing that there is such a court in every county, whereas Federal courts are comparatively few; in many States there is but one.[1]

How does the Federal authority, be it executive or judicial, act upon the citizens of a State? It acts on them directly by means of its own officers, who are quite distinct from and independent of the State officials. Federal indirect taxes, for instance, are levied all along the coast and over the country by Federal custom-house collectors and excisemen, acting under the orders of the treasury department at Washington. The judgments of Federal courts are carried out by United States marshals, likewise dispersed over the country and supplied with a staff of assistants. This is a provision of the utmost importance, for it enables the central national government to keep its finger upon the people everywhere, and make its laws and the commands of its duly constituted authorities respected whether the State within whose territory it acts be heartily loyal or not, and whether the law which is being enforced be popular or obnoxious. The machinery of the National government ramifies over the whole

[1] Of course a plaintiff who thinks local prejudice will befriend him will choose the State court, but the defendant may have the cause removed to a Federal court if he be a citizen of another State or an alien, or if the question at issue is such as to give Federal jurisdiction.

Union as the nerves do over the human body, placing every point in direct connection with the central executive. The same is, of course, true of the army; but the army is so small and stationed in so few spots, mostly in the Far West where Indian raids are feared, that it scarcely comes into a view of the ordinary working of the system.

What happens if the authority of the National government is opposed, if, for instance, an execution levied in pursuance of a judgment of a Federal court is resisted, or Federal excisemen are impeded in the seizure of an illicit distillery?

Supposing the United States marshal or other Federal officer to be unable to overcome the physical force opposed to him, he may summon all good citizens to assist him, just as the sheriff may summon the *posse comitatus*. If this appeal proves insufficient, he must call upon the President, who may either order national troops to his aid or may require the militia of the State in which resistance is offered to overcome that resistance. Inferior Federal officers are not entitled to make requisitions for State force. The common law principle that all citizens are bound to assist the ministers of the law holds good in America as in England, but it is as true in the one country as in the other, that what is everybody's business is nobody's business. Practically, the Federal authorities are not resisted in the more orderly States and more civilized districts. In such regions, however, as the mountains of Tennessee and North Carolina the inland revenue officials find it very hard to enforce the excise laws, because the country is wild, concealment is easy among the woods and rocks, and the population sides with the smugglers. And in some of the western States an injunction granted by a

court, whether a Federal or a State court, is occasionally disregarded.[1] Things were, of course, much worse before the War of Secession had established the authority of the central government on an immovable basis. Federal law did not prove an unquestioned protection either to persons who became in some districts unpopular from preaching Abolitionism, or who, like the Southern slave-catchers, endeavoured, under the Fugitive Slave laws, to recapture in the northern States slaves who had escaped from their masters.[2] Passion ran high, and great as is the respect for law, passion in America, as everywhere else in the world, will have its way.

If the duly constituted authorities of a State resist the laws and orders of the National government, a more difficult question arises. This has several times happened.

In 1798 the legislatures of Kentucky and Virginia adopted resolutions whereby they declared that the Constitution was not a submission of the States to a general government, but a mere compact between the States vesting in such a government certain strictly specified powers, that the general government had not been made the final and exclusive judge of the extent of its own powers, and that when it went beyond the powers actually granted, its assumptions were unauthoritative and its acts invalid. They then went on to declare that certain statutes recently passed by Congress were void, and asked the other States to join in this pronounce-

[1] The attacks upon the Chinese which Federal authorities have had to check have mostly taken place not in States but in Territories, such as Washington Territory and Montana, where the direct power of the Federal Government is greater than in a State. See Chapter XLVII.

[2] It was held that a State could not authorize its courts to enforce the Fugitive Slave laws. Being Federal statutes, they must be left to be enforced by the National government only. See *Prigg* v. *Pennsylvania*, 16 Pet. 539.

ment and to co-operate in securing the repeal of the statutes.[1]

In 1808 the legislatures of some of the New England States passed resolutions condemning the embargo which the National government had laid upon shipping by an Act of that year. The State judges, emboldened by these resolutions, "took an attitude consistently hostile to the embargo," holding it to be unconstitutional; and the Federal courts in New England "seldom succeeded in finding juries which would convict even for the most flagrant violation of its provisions."[2] In 1812 the governors of Massachusetts and Connecticut refused to allow the State militia to leave their State in pursuance to a requisition made by the President under the authority of an Act of Congress, alleging the requisition to be unconstitutional. In 1828-30 Georgia refused to obey an Act of Congress regarding the Cherokee Indians, and to respect the treaties which the United States had made with this tribe and the Creeks. The Georgian legislature passed and enforced Acts in contempt of Federal authority, and disregarded the orders of the Supreme court, President Jackson, who had an old frontiersman's hatred to the Indians, declining to interfere.

Finally, in 1832, South Carolina, first in a State convention and then by her legislature, amplified while pro-

[1] There have been endless discussions in America as to the true meaning and intent of these famous resolutions, a lucid account of which may be found in the article (by Mr. Alex. Johnston) "Kentucky Resolutions," in the *American Cyclopædia of Political Science*. The Kentucky resolutions were drafted by Jefferson, who however did not acknowledge his authorship till long afterwards, the Virginia resolutions by Madison.

Judge Cooley observes to me, "The most authoritative exponents of the States' Rights creed would probably have said that 'the nullification by the States of all unauthorized acts done under cover of the Constitution' intended by the Resolutions, was a nullification by constitutional means."

[2] See article "Embargo" (by Mr. Alex. Johnston) in the *American Cyclopædia of Political Science*.

fessing to repeat the claim of the Kentucky resolutions of 1798, declared the tariff imposed by Congress to be null and void as regarded herself, and proceeded to prepare for secession and war. In none of these cases was the dispute fought out either in the courts or in the field;[1] and the questions as to the right of a State to resist Federal authority, and as to the means whereby she could be coerced, were left over for future settlement. Settled they finally were by the Civil War of 1861-65, since which time the following doctrines may be deemed established:—

No State has a right to declare an act of the Federal government invalid.[2]

No State has a right to secede from the Union.

The only authority competent to decide finally on the constitutionality of an act of Congress or of the national executive is the Federal judiciary.[3]

[1] The Acts complained of by Kentucky and Virginia provoked a reaction which led to the overthrow of the Federalist party which had passed them. Of the most important among them, one was repealed and the other, the Sedition Act, expired in 1801 by effluxion of time. Jefferson, when he became President in that year, showed his disapproval of it by pardoning persons convicted under it. The Embargo was raised by Congress in consequence of the strong opposition of New England. In these cases, therefore, it may be thought that the victory substantially remained with the protesting States, while the resistance of South Carolina to the tariff was settled by a compromise.

[2] Of course, as already observed, a State officer or a private citizen may disregard an act of the Federal government if he holds it unconstitutional. But he does so at his peril.

[3] Any court, State or Federal, may decide on such a question in the first instance. But if the question be a purely political one, it may be incapable of being decided by any court whatever (see Chapter XXIV.), and in such cases the decision of the political departments (Congress or the President, as the case may be) of the Federal government is necessarily final, though, of course, liable to be reversed by a subsequent Congress or President. The cases which arose on the Reconstruction Acts, after the War of Secession, afford an illustration. The attempts made to bring these before the courts failed, and the acts were enforced. See *Georgia* v. *Stanton*, 6 Wall. p. 57; and Cooley, *Principles*, pp. 138, 198.

Any act of a State legislature or State executive conflicting with the Constitution, or with an act of the National government done under the Constitution, is really an act not of the State government, which cannot legally act against the Constitution, but of persons falsely assuming to act as such government, and is therefore *ipso jure* void.[1] Those who disobey Federal authority on the ground of the commands of a State authority are therefore insurgents against the Union who must be coerced by its power. The coercion of such insurgents is directed not against the State but against them as individual though combined wrongdoers. A State cannot secede and cannot rebel. Similarly, it cannot be coerced.

This view of the matter, which seems on the whole to be that taken by the Supreme court in the cases that arose after the Civil War, disposes, as has been well observed by Judge Hare,[2] of the difficulty which President Buchanan felt (see his message of 3d December 1860) as to the coercion of a State by the Union. He argued that because the Constitution did not provide for such coercion, a proposal in the Convention of 1787 to authorize it having been ultimately dropped, it was legally impossible. The best answer to this contention is that such a provision would have been superfluous, because a State cannot legally act against the Constitution. All that is needed is the power, unquestionably contained in the Constitution (Art. iii. § 3),

[1] It may, however, happen that a State law is unconstitutional in part only, perhaps in some trifling details, and in such cases that part only will be invalid, and the rest of the law will be upheld. For instance, a criminal statute might be framed so as to apply retrospectively as well as prospectively. So far as retrospective it would be bad, but good for all future cases. (See Constit., Art. i. § 10, par. 1.)

[2] *Lectures on American Constitutional Law*, p. 45.

to subdue and punish individuals guilty of treason against the Union.[1]

Except in the cases which have been already specified, the National government has no right whatever of interfering either with a State as a commonwealth or with the individual citizens thereof, and may be lawfully resisted should it attempt to do so.

"What then?" the European reader may ask. "Is the National government without the power and the duty of correcting the social and political evils which it may find to exist in a particular State, and which a vast majority of the nation may condemn. Suppose widespread brigandage to exist in one of the States, endangering life and property. Suppose contracts to be habitually broken, and no redress to be obtainable in the State courts. Suppose the police to be in league with the assassins. Suppose the most mischievous laws to be enacted, laws, for instance, which recognize polygamy, leave homicide unpunished, drive away capital by imposing upon it an intolerable load of taxation. Is the nation obliged to stand by with folded arms while it sees a meritorious minority oppressed, the prosperity of the State ruined, a pernicious example set to other States? Is it to be debarred from using its supreme authority to rectify these mischiefs?"

The answer is, Yes. Unless the legislation or administration of such a State transgresses some provision of the Federal Constitution (such as that forbidding *ex post facto* laws, or laws impairing the obligation of a contract), the National government not only ought not to interfere but cannot interfere. The State must go

[1] The Swiss Constitution allows the Federal government to coerce a disobedient canton. This is commonly done by quartering Federal troops in it at its expense till its government yields—a form of coercion which Swiss frugality dislikes, or by withholding its share of Federal grants.

its own way, with whatever injury to private rights and common interests its folly or perversity may cause.

Such a case is not imaginary. In the Slave States before the war, although the negroes were not generally ill treated, many shocking laws were passed, and society was going from bad to worse. In parts of a few of the western, and especially of the south-western States at this moment, the roads and even the railways are infested by robbers, justice is uncertain and may be unattainable when popular sentiment does not support the law. Homicide often goes unpunished by the courts, though sometimes punished by Judge Lynch. So, too, in a few of these States statutes opposed to sound principles of legislation have been passed, and have brought manifold evils in their train. But the Federal government looks on unperturbed, with no remorse for neglected duty.

The obvious explanation of this phenomenon is that the large measure of independence left to the States under the Federal system makes it necessary to tolerate their misdoings in some directions. As a distinguished authority[1] observes, "The Federal Constitution provided for the protection of contracts, and against those oppressions most likely to result from popular passion and demoralization; and if it had been proposed to go further and give to the Federal authority a power to intervene in still more extreme cases, the answer would probably have been that such cases were far less likely to arise than was the Federal power to intervene improperly under the pressure of party passion or policy, if its intervention were permitted. To have authorized such intervention would have been to run counter to the whole spirit of the Constitution, which kept steadily in view as the wisest

[1] Judge Cooley, in a letter to the author.

policy local government for local affairs, general government for general affairs only. Evils would unquestionably arise. But the Philadelphia Convention believed that they would be kept at a minimum and most quickly cured by strict adherence to this policy. The scope for Federal interference was considerably enlarged after the Civil War, but the general division of authority between the States and the nation was not disturbed."

So far from lamenting as a fault, though an unavoidable fault, of their Federal system, the State independence I have described, the Americans are inclined to praise it as a merit. They argue, not merely that the best way on the whole is to leave a State to itself, but that this is the only way in which a permanent cure of its diseases will be effected. They are consistent not only in their Federal principles but in their democratic principles. "As *laissez aller*," they say, "is the necessary course in a Federal government, so it is the right course in all free governments. Law will never be strong or respected unless it has the sentiment of the people behind it. If the people of a State make bad laws, they will suffer for it. They will be the first to suffer. Let them suffer. Suffering, and nothing else, will implant that sense of responsibility which is the first step to reform. Therefore let them stew in their own juice: let them make their bed and lie upon it. If they drive capital away, there will be less work for the artisans: if they do not enforce contracts, trade will decline, and the evil will work out its remedy sooner or later. Perhaps it will be later rather than sooner: if so, the experience will be all the more conclusive. Is it said that the minority of wise and peaceable citizens may suffer? Let them exert themselves to bring their fellows round to a better mind. Reason and experience will be on their

side. We cannot be democrats by halves; and where self-government is given, the majority of the community must rule. Its rule will in the end be better than that of any external power." No doctrine more completely pervades the American people, the instructed as well as the uninstructed. Philosophers will tell you that it is the method by which Nature governs, in whose economy error is followed by pain and suffering, whose laws carry their own sanction with them. Divines will tell you that it is the method by which God governs: God is a righteous Judge and God is provoked every day, yet He makes His sun to rise on the evil and the good, and sends His rain upon the just and the unjust. He does not directly intervene to punish faults, but leaves sin to bring its own appointed penalty. Statesmen will point to the troubles which followed the attempt to govern the reconquered seceding States, first by military force and then by keeping a great part of their population disfranchised, and will declare that such evils as still exist in the South are far less grave than those which the denial of ordinary self-government involved. "So," they pursue, "Texas and California will in time unlearn their bad habits and come out right if we leave them alone: Federal interference, even had we the machinery needed for prosecuting it, would check the natural process by which the better elements in these raw communities are purging away the maladies of youth, and reaching the settled health of manhood."

A European may say that there is a dangerous side to this application of democratic faith in local majorities and in *laissez aller*. Doubtless there is: yet those who have learnt to know the Americans will answer that no nation so well understands its own business.

CHAPTER XXIX

CRITICISM OF THE FEDERAL SYSTEM

ALL Americans have long been agreed that the only possible form of government for their country is a Federal one. All have perceived that a centralized system would be inexpedient, if not unworkable, over so large an area, and have still more strongly felt that to cut up the continent into absolutely independent States would, not only involve risks of war but injure commerce and retard in a thousand ways the material development of every part of the country. But regarding the nature of the Federal tie that ought to exist there have been keen and frequent controversies, dormant at present, but which might break out afresh should there arise a new question of social or economic change capable of bringing the powers of Congress into collision with the wishes of any State or group of States. The general suitability to the country of a Federal system is therefore accepted, and need not be discussed. I pass to consider the strong and weak points of that which exists.

The faults generally charged on federations as compared with unified governments are the following :—

I. Weakness in the conduct of foreign affairs.

II. Weakness in home government, that is to say,

deficient authority over the component States and the individual citizens.

III. Liability to dissolution by the secession or rebellion of States.

IV. Liability to division into groups and factions by the formation of separate combinations of the component States.

V. Want of uniformity among the States in legislation and administration.

VI. Trouble, expense, and delay due to the complexity of a double system of legislation and administration.

The first four of these are all due to the same cause, viz. the existence within one government, which ought to be able to speak and act in the name and with the united strength of the nation, of distinct centres of force, organized political bodies into which part of the nation's strength has flowed, and whose resistance to the will of the majority of the whole nation is likely to be more effective than could be the resistance of individuals, because such bodies have each of them a government, a revenue, a militia, a local patriotism to unite them, whereas individual recalcitrants, however numerous, would be unorganized, and less likely to find a legal standing ground for opposition. The gravity of the first two of the four alleged faults has been exaggerated by most writers, who have assumed on rather scanty grounds that Federal governments are necessarily weak governments. History does not warrant so broad a proposition. Assuming, however, for the sake of argument, that troubles may be expected to flow from these four features of a Federal system, let us see how far America has experienced such troubles.

I. In its early years, the Union was not successful in

the management of its foreign relations. Few popular governments are, because a successful foreign policy needs in a world such as ours conditions which popular governments seldom enjoy. Some of the faults which marked American policy may however be set down to the Federal character of the government. In the days of Adams, Jefferson, and Madison, the Union put up with a great deal of ill-treatment from France as well as from England. It drifted rather than steered into the war of 1812. The conduct of that war was hampered by the opposition of the New England States. The Mexican war of 1846 was due to the slaveholders; but the combination among the Southern leaders which entrapped the nation into that conflict might have been equally successful in a unified country. Of late years the principle of abstention from Old World complications has been so heartily and consistently adhered to that the capacities of the Federal system for the conduct of foreign affairs have been little tried; and the likelihood of any danger from abroad is so slender that it may be practically ignored. But when a question of external policy arises which interests only one part of the Union, the existence of States feeling themselves specially affected may have a strong and probably an unfortunate influence. It is only in this way that the American government can be deemed likely to suffer in its foreign relations from its Federal character.

II. For the purposes of domestic government the Federal authority is now, in ordinary times, sufficiently strong. However, as was remarked in last chapter, there have been occasions when the resistance of even a single State disclosed its weakness. Had a man less vigorous than Jackson occupied the presidential chair in 1832, South Carolina would probably have prevailed

against the Union. In the Kansas troubles of 1855-56 the national executive played a sorry part; and even in the resolute hands of President Grant it was hampered in the re-establishment of order in the reconquered southern States by the rights which the Federal Constitution secured to those States. The only general conclusion on this point which can be drawn from history is that while the central government is likely to find less and less difficulty in enforcing its will against a State or disobedient subjects, because the prestige of its success in the Civil War has strengthened it, because the Union sentiment is still growing, and because the facilities of communication make the raising and moving of troops more easy, nevertheless recalcitrant States, or groups of States, still enjoy certain advantages for resistance, advantages due partly to their legal position, partly to their local sentiment, which rebels might not have in unified countries like England, France, or Italy.

III. Everybody knows that it was the Federal system and the doctrine of State sovereignty grounded thereon, and not expressly excluded, though certainly not recognized, by the Constitution, which led to the secession of 1861, and which gave European powers a plausible ground for recognizing the insurgent minority as belligerents. Nothing seems now less probable than another secession, not merely because the supposed legal basis for it has been abandoned, and because the advantages of continued union are more obvious than ever before, but because the precedent of the victory won by the North will discourage like attempts in the future.[1] This is so strongly felt that it has not even

[1] The Roman Catholic cantons of Switzerland (or rather the majority of them) formed a separate league (the so-called Sonderbund) which it needed the war of 1846 to put down. And the effect of that war was, as in the parallel case of America, to tighten the Federal bond for the future.

been thought worth while to add to the Constitution an amendment negativing the right to secede. The doctrine of the legal indestructibility of the Union is now well established. To establish it, however, cost thousands of millions of dollars and the lives of a million of men.

IV. The combination of States into groups was a familiar feature of politics before the war. South Carolina and the Gulf States constituted one such, and the most energetic, group; the New England States frequently acted as another, especially during the war of 1812. At present, though there are several sets of States whose common interests lead their representatives in Congress to act together, it is no longer the fashion for States to combine in an official way through their State organizations, and their doing so would excite reprehension. It is easier, safer, and more effective to act through the great national parties. Any considerable State interest (such as that of the silver-miners or cattle-men, or Protectionist manufacturers) can generally compel a party to conciliate it by threatening to forsake the party if neglected. Political action runs less in State channels than it did formerly, and the only really threatening form which the combined action of States could take, that of using for a common disloyal purpose State revenues and the machinery of State governments, has become, since the failure of secession, most improbable.

V. The want of uniformity in private law and methods of administration is an evil which different minds will judge by different standards. Some may think it a positive benefit to secure a variety which is interesting in itself and makes possible the trying of experiments from which the whole country may profit. Is variety within a country more a gain or a loss? Diversity in

coinage, in weights and measures, in the rules regarding bills and cheques and banking and commerce generally, is obviously inconvenient. Diversity in dress, in food, in the habits and usages of society, is almost as obviously a thing to rejoice over, because it diminishes the terrible monotony of life. Diversity in religious opinion and worship excited horror in the Middle Ages, but now passes unnoticed unless where accompanied by intolerance. In the United States the possible diversity of laws is immense. Each State can play whatever tricks it pleases with the law of family relations, of inheritance, of contracts, of torts, of crimes.[1] But the actual diversity is not great, for all the States, save Louisiana, have taken the English common and statute law of 1776 as their point of departure, and have adhered to its main principles. A more complete uniformity as regards marriage and divorce might be desirable, for it is particularly awkward not to know whether you are married or not, nor whether you have been or can be divorced or not; and several States have tried bold experiments in divorce laws.[2] But, on the whole, far less inconvenience than could have been expected seems to be caused by the varying laws of different States, partly because commercial law is the department in which the diversity is smallest, partly because American practitioners and

[1] Subject to a few prohibitions contained in the Constitution.

[2] Judge Cooley, however, observes to me that there is little substantial diversity in the laws of marriage in different States, the general rule everywhere being that no special ceremony is requisite, and the statutory forms not being deemed imperative. He adds that even as regards divorce far more trouble arises from frauds practised on the laws than from divergent provisions in the laws themselves. It may be observed that although the law of Scotland still differs in many material points from that of England and Ireland, having had a wholly different origin, British subjects and courts do not find the practical inconveniences arising from the diversities to be serious except as respects marriage and the succession to property. The mercantile law of the two countries tends to become practically the same.

judges have become expert in applying the rules for determining which law, where those of different States are in question, ought to be deemed to govern a given case.[1]

VI. He who is conducted over an iron-clad war-ship, and sees the infinite intricacy of the machinery and mechanical appliances which it contains and by which its engines, its guns, its turrets, its torpedoes, its apparatus for anchoring and making sail, are worked, is apt to think that it must break down in the rough practice of war. He is told, however, that the more is done by machinery, the more safely and easily does everything go on, because the machinery can be relied on to work accurately, and the performance by it of the heavier work leaves the crew free to attend to the general management of the vessel and her armament. So in studying the elaborate devices with which the Federal system of the United States has been equipped, one fancies that with so many authorities and bodies whose functions are intricately interlaced, and some of which may collide with others, there must be a great risk of break-downs and deadlocks, not to speak of an expense much exceeding that which is incident to a simple centralized government. The Americans do not seem to feel this. They tell you that smoothness of working is secured by elaboration of device, that complex as the mechanism of their government may appear, the citizens have grown so familiar with it that its play is smooth and easy, attended with less trouble, and certainly with less suspicion on the part of the people, than would belong to a scheme which vested all powers

1 American jurists, and especially Mr. Justice Story, have done much to elucidate this difficult branch of law, to which the name of Private International Law is usually (though not very happily) applied.

in one administration and one legislature. The expense is admitted, but is considered no grave defect when compared with the waste which arises from untrustworthy officials and legislators whose depredations would, it is thought, be greater were their sphere of action wider, and the checks upon them fewer. He who examines a system of government from without is generally disposed to overrate the difficulties in working which its complexity causes. Few things, for instance, are harder than to explain to a person who has not been a student in one of the two ancient English universities the nature of their highly complex constitution and the relation of the colleges to the university. If he does apprehend it he pronounces it too intricate for the purposes it has to serve. To those who have grown up under it, nothing is simpler and more obvious.

There is a blemish characteristic of the American federation which Americans seldom notice because it seems to them unavoidable. This is the practice in selecting candidates for Federal office of regarding not so much the merits of the candidate as the effect which his nomination will have upon the vote of the State to which he belongs. Second-rate men are run for first-rate posts, not because the party which runs them overrates their capacity, but because it expects to carry their State either by their local influence or through the pleasure which the State feels in the prospect of seeing one of its own citizens in high office. This of course works in favour of the politicians who come from a large State. No doubt the leading men of a large State are *prima facie* more likely to be men of high ability than those of a small State, because the field of choice is wider, the competition probably keener. One is reminded of the story of the leading citizen in the isle of

Seriphus who observed to Themistocles, "You would not have been famous had you been born in Seriphus," to which Themistocles replied, "Neither would you had you been born in Athens." The two great States of Virginia and Massachusetts reared one half of the men who won distinction in the first fifty years of the history of the Republic.[1] Nevertheless it often happens that a small State produces a first-rate man, whom the country ought to have in its highest places, as President, or as Speaker of the House of Representatives, but who is passed over because the Federal system gives great weight to the voice of a State, and because State sentiment is so strong that the voters of a State which has a large and perhaps a doubtful vote to cast in national elections, prefer an inferior man in whom they are directly interested to a superior one who is a stranger.

I have left to the last the gravest reproach which Europeans have been wont to bring against Federalism in America. They attribute to it the origin, or at least the virulence, of the great struggle over slavery which tried the Constitution so severely. That struggle created parties which, though they had adherents everywhere, no doubt tended more and more to become identified with States, controlling the State organizations and bending the State governments to their service. It gave tremendous importance to legal questions arising out of the differences between the law of the Slave States and the Free States, questions which the Constitution had either evaded or not foreseen. It shook the credit of the Supreme court by making the judicial decision of those questions appear due to par-

[1] Webster may be fairly counted to Massachusetts, as he settled there in early life, and sat for many years as senator from it.

tiality to the Slave States. It disposed the extreme men on both sides to hate the Federal Union which bound them in the same body with their antagonists. It laid hold of the doctrine of State rights and State sovereignty as entitling a commonwealth which deemed itself aggrieved to shake off allegiance to the national government. Thus at last it brought about secession and the great civil war. Even when the war was over, the dregs of the poison continued to haunt and vex the system, and bred fresh disorders in it. The constitutional duty of re-establishing the State governments of the conquered States on the one hand, and on the other hand the practical danger of doing so while their people remained disaffected, produced the military governments, the "carpet bag" governments, the Ku Klux Klan outrages, the gift of suffrage to a negro population unfit for such a privilege, yet apparently capable of being protected in no other way. All these mischiefs, it has often been argued, are the results of the Federal structure of the government, which carried in its bosom the seeds of its own destruction, seeds sure to ripen so soon as there arose a question that stirred men deeply.

It may be answered not merely that the National government has survived this struggle and emerged from it stronger than before, but also that Federalism did not produce the struggle, but only gave to it the particular form of a series of legal controversies over the Federal pact followed by a war of States against the Union. Where such vast economic interests were involved, and such hot passions roused, there must anyhow have been a conflict, and it may well be that a conflict raging within the vitals of a centralized government would have proved no less terrible and would have left as many noxious *sequelae* behind.

In blaming either the conduct of a person or the plan and scheme of a government for evils which have actually followed, one is apt to overlook those other evils, perhaps as great, which might have flowed from different conduct or some other plan. All that can fairly be concluded from the history of the American Union is that Federalism is obliged by the law of its nature to leave in the hands of States powers whose exercise may give to political controversy a peculiarly dangerous form, may impede the assertion of national authority, may even, when long-continued exasperation has suspended or destroyed the feeling of a common patriotism, threaten national unity itself. Against this danger is to be set the fact that the looser structure of a Federal government and the scope it gives for diversities of legislation in different parts of a country may avert sources of discord, or prevent local discord from growing into a contest of national magnitude.

CHAPTER XXX

MERITS OF THE FEDERAL SYSTEM

I DO not propose to discuss in this chapter the advantages of Federalism in general, for to do this we should have to wander off to other times and countries, to talk of Achaia and the Hanseatic League and the Swiss Confederation. I shall comment on those merits only which the experience of the American Union illustrates.

There are two distinct lines of argument by which their Federal system was recommended to the framers of the Constitution, and upon which it is still held forth for imitation to other countries. These lines have been so generally confounded that it is well to present them in a precise form.

The first set of arguments point to Federalism proper, and are the following:—

1. That Federalism furnishes the means of uniting commonwealths into one nation under one national government without extinguishing their separate administrations, legislatures, and local patriotisms. As the Americans of 1787 would probably have preferred complete State independence to the fusion of their States into a unified government, Federalism was the only resource. So when the new Germanic Empire, which is really a Federation, was established in 1870,

Bavaria and Wurtemberg could not have been brought under a national government save by a Federal scheme. Similar suggestions, as every one knows, have been made for re-settling the relations of Ireland to Great Britain, and of the self-governing British colonies to the United Kingdom. There are causes and conditions which dispose nations living under a loosely compacted government, or under a number of almost independent governments, to form a closer union in a Federal form. There are other causes and conditions which dispose the subjects of one government, or sections of these subjects, to desire to make their governmental union less close by substituting a system of a Federal character. In both sets of cases, the centripetal or centrifugal forces spring from the local position, the history, the sentiments, the economic needs of those among whom the problem arises; and that which is good for one people or political body is not necessarily good for another. Federalism may be an equally legitimate resource where it is adopted for the sake of tightening or of loosening a pre-existing bond.

2. That Federalism supplies the best means of developing a new and vast country. It permits an expansion whose extent, and whose rate and manner of progress, cannot be foreseen to proceed with more variety of methods, more adaptation of laws and administration to the circumstances of each part of the territory, and altogether in a more truly natural and spontaneous way, than can be expected under a centralized government, which is disposed to apply its settled system through all its dominions. Thus the special needs of a new region are met by the inhabitants in the way they find best: its special evils are cured by special remedies, perhaps more drastic than an old country

demands, perhaps more lax than an old country would tolerate; while at the same time the spirit of self-reliance among those who build up these new communities is stimulated and respected.

3. That it prevents the rise of a despotic central government, absorbing other powers, and menacing the private liberties of the citizen. This may now seem to have been an idle fear, so far as America was concerned. It was, however, a very real fear among the great-grandfathers of the present Americans, and nearly led to the rejection even of so undespotic an instrument as the Federal Constitution of 1789. Congress (or the President, as the case may be) is still sometimes described as a tyrant by the party which does not control it, simply because it is a central government: and the States are represented as bulwarks against its encroachments.

The second set of arguments relate to and recommend not so much Federalism as local self-government. I state them briefly because they are familiar.

4. Self-government stimulates the interest of people in the affairs of their neighbourhood, sustains local political life, educates the citizen in his daily round of civic duty, teaches him that perpetual vigilance and the sacrifice of his own time and labour are the price that must be paid for individual liberty and collective prosperity.

5. Self-government secures the good administration of local affairs by giving the inhabitants of each locality due means of overseeing the conduct of their business.

That these two sets of grounds are distinct appears from the fact that the sort of local interest which local self-government evokes is quite a different thing from the interest men feel in the affairs of a large body like an American State. So, too, the control over its own

affairs of a township, or even a small county, where everybody can know what is going on, is quite different from the control exercisable over the affairs of a commonwealth with a million of people. Local self-government may exist in a unified country like England, and may be wanting in a Federal country like Germany. And in America itself, while some States, like those of New England, possessed an admirably complete system of local government, others, such as Virginia, the old champion of State sovereignty, were imperfectly provided with it. Nevertheless, through both sets of arguments there runs the general principle, applicable in every part and branch of government, that, where other things are equal, the more power is given to the units which compose the nation, be they large or small, and the less to the nation as a whole and to its central authority, so much the fuller will be the liberties and so much greater the energy of the individuals who compose the people. This principle, though it had not been then formulated in the way men formulate it now, was heartily embraced by the Americans. Perhaps it was because they agreed in taking it as an axiom that they seldom referred to it in the subsequent controversies regarding State rights. These controversies proceeded on the basis of the Constitution as a law rather than on considerations of general political theory. A European reader of the history of the first seventy years of the United States is surprised how little is said, through the interminable discussions regarding the relation of the Federal government to the States, on the respective advantages of centralization or localization of powers as a matter of historical experience and general expediency.

Three further benefits to be expected from a Federal system may be mentioned, benefits which seem to have

been unnoticed or little regarded by those who established it in America.

6. Federalism enables a people to try experiments in legislation and administration which could not be safely tried in a large centralized country. A comparatively small commonwealth like an American State easily makes and unmakes its laws; mistakes are not serious, for they are soon corrected; other States profit by the experience of a law or a method which has worked well or ill in the State that has tried it.

7. Federalism, if it diminishes the collective force of a nation, diminishes also the risks to which its size and the diversities of its parts expose it. A nation so divided is like a ship built with water-tight compartments. When a leak is sprung in one compartment, the cargo stowed there may be damaged, but the other compartments remain dry and keep the ship afloat. So if social discord or an economic crisis has produced disorders or foolish legislation in one member of the Federal body, the mischief may stop at the State frontier instead of spreading through and tainting the nation at large.

8. Federalism, by creating many local legislatures with wide powers, relieves the national legislature of a part of that large mass of functions which might otherwise prove too heavy for it. Thus business is more promptly despatched, and the great central council of the nation has time to deliberate on those questions which most nearly touch the whole country.

All of these arguments recommending Federalism have proved valid in American experience.

To create a nation while preserving the States was the main reason for the grant of powers which the National government received; an all-sufficient reason, and one which holds good to-day. The several States

have changed greatly since 1789, but they are still commonwealths whose wide authority and jurisdiction practical men are agreed in desiring to maintain.

Not much was said in the Convention of 1787 regarding the best methods of extending government over the unsettled territories lying beyond the Alleghany mountains.[1] It was, however, assumed that they would develop as the older colonies had developed, and in point of fact each district, when it became sufficiently populous, was formed into a self-governing State, the less populous divisions still remaining in the status of semi-self-governing Territories. Although many blunders have been committed in the process of development, especially in the reckless contraction of debt and the wasteful disposal of the public lands, greater evils might have resulted had the creation of local institutions and the control of new communities been left to the Central government.[2] Congress would have been not less improvident than the State governments, for it would have been even less closely watched. The opportunities for jobbery would have been irresistible, the growth of order and civilization probably slower. It deserves to be noticed that, in granting self-government to all those of her colonies whose population is of English race,

[1] In 1787, however, the great Ordinance regulating the North-West Territory was enacted by the Congress of the Confederation.

[2] The United States is proprietor of the public domain in the Territories, and when a new State is organized the ownership is not changed. The United States, however, makes grants of wild lands to the new State as follows:—(1) Of every section numbered 16 (being one thirty-sixth of all) for the support of common schools. (2) Of lands to endow a university. (3) Of the lands noted in the surveys as swamp lands, and which often are valuable. (4) It has usually made further grants to aid in the construction of railroads, and for an agricultural college. The grants commonly leave the United States a much larger landowner within the State than is the State itself, and when all the dealings of the National government with its lands are considered, it is more justly chargeable with squandering the public domain than the States are.

England has practically adopted the same plan as the United States have done with their western territory. The results have been generally satisfactory, although England, like America, has found that her colonists are disposed to treat the aboriginal inhabitants, whose lands they covet and whose persons they hate, with a harshness and injustice which the mother country would gladly check.

The arguments which set forth the advantages of local self-government were far more applicable to the States of 1787 than to those of 1887. Virginia, then the largest State, had only half a million free inhabitants, less than the present population of Chicago or Liverpool. Massachusetts had 450,000, Pennsylvania 400,000, New York 300,000; while Georgia, Rhode Island, and Delaware had (even counting slaves) less than 200,000 between them.[1] These were communities to which the expression "local self-government" might be applied, for, although the population was scattered, the numbers were small enough for the citizens to have a personal knowledge of their leading men, and a personal interest (especially as a large proportion were landowners) in the economy and prudence with which common affairs were managed. Now, however, when of the thirty-eight States twenty-two have more than a million inhabitants, and four have more than three millions, the newer States being, moreover, larger in area than most of the older ones, the stake of each citizen is relatively smaller, and generally too small to sustain his activity in politics, and the party chiefs of the State are known to him only by the newspapers or by their occasional visits on a stumping tour.[2]

[1] I give the round numbers, reducing them a little from the numbers which appear in the census of 1790.

[2] To have secured the real benefits of local self-government the States

All that can be claimed for the Federal system under this head of the argument is that it provides the machinery for a better control of the taxes raised and expended in a given region of the country, and a better oversight of the public works undertaken there than would be possible were everything left to the Central government.[1] As regards the educative effect of numerous and frequent elections, a European observer is apt to think that elections in America are too many and come too frequently. Overtaxing the attention of the citizen and frittering away his interest, they leave him at the mercy of knots of selfish adventurers. Of this, however, more will be said in a subsequent chapter.

The utility of the State system in localizing disorders or discontents, and the opportunities it affords for trying easily and safely experiments which ought to be tried in legislation and administration, constitute benefits to be set off against the risk, referred to in the last preceding chapters, that evils may continue in a district, may work injustice to a minority and invite imitation by other States, which the wholesome stringency of the Central government might have suppressed. Europeans are startled by the audacity with which Americans apply the doctrine of *laissez aller;* Americans declare that their method is not only the most consistent but in the end the most curative.

A more unqualified approval may be given to the

ought to have been kept at a figure not much above that of their original population, their territory being cut up into new States as the population increased. Had this been done—no doubt at the cost of some obvious disadvantages, such as the undue enlargement of the Senate, and the predominance of a single large city in a State,—there would now be more than two hundred instead of only thirty-eight States.

[1] It must, of course, be remembered that in most parts of the Union the local self-government of cities, counties, townships, and school districts exists in a more complete form than in any of the great countries of Europe.—As to this, see Chapters XLVIII.–LII. *post.*

division of legislative powers. The existence of the State legislatures relieves Congress of a burden too heavy for its shoulders; for although it has far less foreign policy to discuss than the Parliaments of England, France, or Italy, and although the separation of the executive from the legislative department gives it less responsibility for the ordinary conduct of the administration than devolves on those Chambers, it could not possibly, were its competence as large as theirs, deal with the multiform and increasing demands of the different parts of the Union. There is great diversity in the material conditions of different parts of the country, and at present the people, particularly in the West, are eager to have their difficulties handled, their economic and social needs satisfied, by the State and the law. Having only a limited field of legislation left to it, Congress may be thought to enjoy better opportunities than the overtasked English Parliament of cultivating that field well. Nevertheless, as has been shown in a previous chapter, its public legislation is scanty, and its private legislation careless and wasteful.

These merits of the Federal system of government which I have enumerated are the counterpart and consequences of that limitation of the central authority whose dangers were indicated in last chapter. They are, if one may reverse the French phrase, the qualities of Federalism's defects. The problem which all federalized nations have to solve is how to secure an efficient central government and preserve national unity, while allowing free scope for the diversities, and free play to the authorities, of the members of the federation. It is, to adopt that favourite astronomical metaphor which no American panegyrist of the Constitution omits, to keep the centrifugal and centripetal forces in equilibrium, so

that neither the planet States shall fly off into space, nor the sun of the Central government draw them into its consuming fires. The characteristic merit of the American Constitution lies in the method by which it has solved this problem. It has given the National government a direct authority over all citizens, irrespective of the State governments, and has therefore been able safely to leave wide powers in the hands of those governments. And by placing the Constitution above both the National and the State governments, it has referred the arbitrament of disputes between them to an independent body, charged with the interpretation of the Constitution, a body which is to be deemed not so much a third authority in the government as the living voice of the Constitution, the unfolder of the mind of the people whose will stands expressed in that supreme instrument.

The application of these two principles, unknown to, or at any rate little used by, any previous federation,[1] has contributed more than anything else to the stability of the American system, and to the reverence which its citizens feel for it, a reverence which is the best security for its permanence. Yet even these devices would not have succeeded but for the presence of a mass of moral and material influences stronger than any political devices, which have maintained the equilibrium of centrifugal and centripetal forces. On the one hand there has been the love of local independence and self-government; on the other, the sense of community in blood, in language, in habits and ideas, a common pride in the national history and the national flag.

[1] The central government in the Achaian League had apparently a direct authority over the citizens of the several cities, but it was so ill defined and so little employed that we can hardly cite that instance as a precedent.

Quid leges sine moribus? The student of institutions, as well as the lawyer, is apt to overrate the effect of mechanical contrivances in politics. I admit that in America they have had one excellent result; they have formed a legal habit in the mind of the nation. But the true value of a political contrivance resides not in its ingenuity but in its adaptation to the temper and circumstances of the people for whom it is designed, in its power of using, fostering, and giving a legal form to those forces of sentiment and interest which it finds in being. So it has been with the American system. Just as the passions which the question of slavery evoked strained the Federal fabric, disclosing unforeseen weaknesses, so the love of the Union, the sense of the material and social benefits involved in its preservation, appeared in unexpected strength, and manned with zealous defenders the ramparts of the sovereign Constitution. It is this need of determining the suitability of the machinery for the workmen and its probable influence upon them, as well as the capacity of the workmen for using and their willingness to use the machinery, which makes it so difficult to predict the operation of a political contrivance, or, when it has succeeded in one country, to advise its imitation in another. The growing strength of the national government in the United States is largely due to sentimental forces that were weak a century ago, and to a development of internal communications which was then undreamt of. And the devices which we admire in the Constitution might prove unworkable among a people less patriotic and self-reliant, less law-loving and law-abiding, than are the English of America.

CHAPTER XXXI

GROWTH AND DEVELOPMENT OF THE CONSTITUTION

THERE is another point of view from which we have still to consider the Constitution. It is not only a fundamental law, but an unchangeable law, unchangeable, that is to say, by the national legislature, and changeable even by the people only through a slow and difficult process. How can a country whose very name suggests to us movement and progress be governed by a system and under an instrument which remains the same from year to year and from century to century?

When we talk of the Constitution of a state or a nation we mean those of its rules or laws which determine the form of its government, and the respective rights and duties of the government towards the citizens and of the citizens towards the government. These rules, or the most important among them, may be contained in one document, such as the Swiss or Belgian Constitution, or may be scattered through a multitude of statutes and reports of judicial decisions, as is the case with regard to what men call the English Constitution. This is a distinction of practical consequence. But a still more important difference exists in the fact that in some countries the rules or laws which make up the Constitution can be made and changed by the ordinary legislature just like

any other laws, while in other countries such rules are placed above and out of the reach of the legislature, having been enacted and being changeable only by some superior authority. In countries of the former class the so-called Constitution is nothing more than the aggregate of those laws—taking law in its widest sense to include customs and judicial decisions—which have a political character; and this description is too vague to be scientifically useful, for no three jurists would agree as to which laws ought to be deemed political. In such countries there is nothing either in the form of what are commonly called constitutional laws, or in the source from which they emanate, or in the degree of their authority, to mark them off from other laws. The Constitution of England is constantly changing, for as the legislature, in the ordinary exercise of its powers, frequently passes enactments which affect the methods of government and the political rights of the citizens, there is no certainty that what is called the Constitution will stand the same at the end of a given session of Parliament as it stood at the beginning.[1] A constitution

[1] The first statesman who remarked this seems to have been James Wilson, who said in 1788, "The idea of a constitution limiting and superintending the operations of legislative authority, seems not to have been accurately understood in Britain. There are at least no traces of practice conformable to such a principle. The British Constitution is just what the British Parliament pleases. When the Parliament transferred legislative authority to Henry VIII., the act transferring could not, in the strict acceptation of the term, be called unconstitutional. To control the powers and conduct of the legislature by an overruling constitution was an improvement in the science and practice of government reserved to the American States."—Elliot's *Debates*, ii. 432. Paley said this in his *Moral Philosophy*, published just before. See the observations of Mr. Theodore W. Dwight on Harrington's proposals for a supreme constitution (*Pol. Sc. Quarterly*, for March 1887); and Oliver Cromwell's Instrument, called "The Government of the Commonwealth of England, Scotland, and Ireland," printed in the *Parliamentary History*, vol. iii. p. 1417. It was provided by this instrument that statutes passed in Parliament should take effect, even if not assented to by the Lord Protector, but only if they were

of this kind, capable at any moment of being bent or turned, expanded or contracted, may properly be called a Flexible Constitution.

In countries of the other class the laws and rules which prescribe the nature, powers, and functions of the government are contained in a document or documents emanating from an authority superior to that of the legislature. This authority may be a monarch who has *octroyé* a charter alterable by himself only. Or it may be the whole people voting at the polls; or it may be a special assembly, or combination of assemblies, appointed *ad hoc*. In any case we find in such countries a law or group of laws distinguished from other laws not merely by the character of their contents, but by the source whence they spring and by the force they exert, a force which overrides and breaks all enactments passed by the ordinary legislature. Where the Constitution consists of such a law or laws, I propose to call it a Rigid Constitution, *i.e.* one which cannot be bent or twisted by the action of the legislature, but stands stiff and solid, opposing a stubborn resistance to the attacks of any majority who may desire to trangress or evade its provisions. As the English Constitution is the best modern instance of the flexible type, so is the American of the rigid type.

It will at once be asked, How can any constitution be truly rigid? Growth and decay are the necessary conditions of the life of institutions as well as of individual organisms. One constitution may be altered less fre-

agreeable to the articles of the instrument, which would therefore appear to have been a genuine rigid constitution within the terms of the definition here given. Some of the provisions of the articles are so minute that they can hardly have been intended to be placed above change by Parliament; but Cromwell seems from the remarkable speech which he delivered on 16th December 1653, in promulgating the Instrument, to have conceived that what he called the Fundamentals should be unchangeable.

quently or easily than another, but an absolutely unchangeable constitution is an impossibility.[1]

The question is pertinent; the suggestion is true. No constitution can be made to stand unsusceptible of change, because if it were, it would cease to be suitable to the conditions amid which it has to work, that is, to the actual forces which sway politics. And being unsuitable, it would be weak, not rooted in the nature of the State and in the respect of the citizens for whom it exists; and being weak, it would presently be overthrown. If therefore we find a rigid constitution tenacious of life, if we find it enjoying, as Virgil says of the gods, a fresh and green old age, we may be sure that it has not stood wholly changeless, but has been so modified as to have adapted itself to the always altering circumstances that have grown up round it. Most of all must this be true of a new country where men and circumstances change faster than in Europe, and where, owing to the equality of conditions, the leaven of new ideas works more thoroughly upon the whole lump.

We must therefore be prepared to expect that the American Constitution will, when its present condition

[1] The constitutions of the ancient world were all or nearly all flexible, because the ancient republics were governed by primary assemblies, all whose laws were of equal validity. By far the most interesting and instructive example is the Constitution of Rome. It presents some striking resemblances to the Constitution of England—both left many points undetermined, both relied largely upon non-legal usages and understandings—and any English constitutional lawyer who should compare the practical workings of the two in an exact and philosophical way would render a service to history and political science.

However, one finds here and there in Greek constitutions provisions intended to secure certain laws from change. At Athens, for instance, there was a distinction between Laws (*νόμοι*) which required the approval of a committee called the Nomothetae, and Decrees (*ψηφίσματα*), passed by the Assembly alone, and any person proposing a decree inconsistent with a law was liable to an action (*γραφὴ παρανόμων*) for having, so to speak, led the people into illegality. His conviction in this action carried with it a declaration of the invalidity of the decree.

is compared with its fire-new condition in 1789, prove to have felt the hand of time and change.

Historical inquiry verifies this expectation. The Constitution of the United States, rigid though it be, has changed, has developed. It has developed in three ways to which I devote the three following chapters.

It has been changed by Amendment. Certain provisions have been struck out of the original document of 1787-88; certain other, and more numerous, provisions have been added. This method needs little explanation, because it is open and direct. It resembles the method in which laws are changed in England, the difference being that whereas in England statutes are changed by the legislature, here in the United States the fundamental law is changed in a more roundabout fashion by the joint action of Congress and the States.

It has been developed by Interpretation, that is, by the unfolding of the meaning implicitly contained in its necessarily brief terms; or by the extension of its provisions to cases which they do not directly contemplate, but which their general spirit must be deemed to cover.

It has been developed by Usage, that is, by the establishment of rules not inconsistent with its express provisions, but giving them a character, effect, and direction which they would not have if they stood alone, and by which their working is materially modified. These rules are sometimes embodied in statutes passed by Congress and repealable by Congress. Sometimes they remain in the stage of a mere convention or understanding which has no legal authority, but which everybody knows and accepts. Whatever their form, they must not conflict with the letter of the Constitution, for if they do conflict with it, they will be deemed invalid whenever a question involving them comes before a court of law.

It may be observed that of these three modes of change, the first is the most obvious, direct, and effective, but also the most difficult to apply, because it needs an agreement of many independent bodies which is rarely attainable. The second mode is less potent in its working, because an interpretation put on a provision may be recalled or modified by the same authority, viz. the courts of law (and especially the Supreme Federal Court), which has delivered it. But while a particular interpretation stands, it is as strong as the Constitution itself, being indeed incorporated therewith, and therefore stronger than anything which does not issue from the same ultimate source of power, the will of the people. The weakest, though the easiest and most frequent method, is the third. For, legislation and custom are altogether subordinate to the Constitution, and can take effect only where the letter of the Constitution is silent, and where no authorized interpretation has extended the letter to an unspecified case. But they work readily, quickly, freely; and the developments to be ascribed to them are therefore as much larger in quantity than those due to the two other methods as they are inferior in weight and permanence.

We shall perceive after examining these three sources of change not only that the Constitution as it now stands owes much to them, but that they are likely to modify it still further as time goes on. We shall find that, rigid as it is, it suffers constant qualification and deflection, and that while its words continue in the main the same, it has come to mean something different to the men of 1888 from what it meant to those of 1808, when it had been at work for twenty years, or even to those of 1858, when the fires of protracted controversy might be thought to have thrown a glare of light into every corner of its darkest chambers.

CHAPTER XXXII

THE AMENDMENT OF THE CONSTITUTION

THE men who sat in the Convention of 1787 were not sanguine enough, like some of the legislating sages of antiquity, or like such imperial codifiers as the Emperor Justinian, to suppose that their work could stand unaltered for all time to come. They provided (Art. v.) that "Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes as part of this Constitution when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode may be prescribed by Congress."

There are therefore two methods of framing and proposing amendments.

(A) Congress may itself, by a two-thirds vote in each house, prepare and propose amendments.

(B) The legislatures of two-thirds of the States may require Congress to summon a Constitutional Convention. Congress shall thereupon do so, having no option to refuse; and the Convention when called shall draft

and submit amendments. No provision is made as to the election and composition of the Convention, matters which would therefore appear to be left to the discretion of Congress.

There are also two methods of enacting amendments framed and proposed in either of the foregoing ways. It is left to Congress to prescribe one or other method as Congress may think fit.

(X) The legislatures of three-fourths of the States may ratify any amendments submitted to them.

(Y) Conventions may be called in the several States, and three-fourths of these conventions may ratify.

On all the occasions on which the amending power has been exercised, method A has been employed for proposing and method X for ratifying—*i.e.* no drafting conventions of the whole Union or ratifying conventions in the several States have ever been summoned. The preference of the action of Congress and the State legislatures may be ascribed to the fact that it has never been desired to remodel the whole Constitution, but only to make changes or additions on special points. Moreover, the procedure by National and State conventions might be slower, and would involve controversy over the method of electing those bodies. The consent of the President is not required to a constitutional amendment.[1] A two-thirds majority in Congress can override his veto of a Bill, and at least that majority is needed to bring a constitutional amendment before the people.

There is only one provision of the Constitution which cannot be changed by this process. It is that which

[1] The point was decided by the Supreme court in 1794 in the case of *Hollingsworth* v. *State of Vermont* (3 Dall. 378); and the Senate came to the same conclusion in 1865. See Jameson on *Constitutional Conventions*, § 560.

secures to each and every State equal representation in one branch of the legislature. "No State without its consent shall be deprived of its equal suffrage in the Senate" (Art. v.) It will be observed that this provision does not require unanimity on the part of the States to a change diminishing or extinguishing State representation in the Senate, but merely gives any particular State proposed to be affected an absolute veto on the proposal. If a State were to consent to surrender its rights, and three-fourths of the whole number to concur, the resistance of the remaining fourth would not prevent the amendment from taking effect.

Following President Lincoln, the Americans speak of the Union as indestructible; and the expression, "An indestructible Union of indestructible States," has been used by the Supreme court in a famous case.[1] But looking at the Constitution simply as a legal document, one finds nothing in it to prevent the adoption of an amendment providing a method for dissolving the existing Federal tie, whereupon such method would be applied so as to form new unions, or permit each State to become an absolutely sovereign and independent commonwealth. The power of the people of the United States appears competent to effect this, should it ever be desired, in a perfectly legal way, just as the British Parliament is legally competent to re-divide Great Britain into the sixteen or eighteen independent kingdoms which existed within the island in the eighth century.

The amendments made by the above process (A + X) to the Constitution have been in all fifteen in number. These have been made on four occasions, and fall into four groups, two of which consist of one amendment each. The first group, including ten amendments made

[1] *Texas* v. *White*, see *ante*, p. 429.

immediately after the adoption of the Constitution, ought to be regarded as a supplement or postscript to it, rather than as changing it. They constitute what the Americans, following the English precedent, call a Bill of Rights, securing the individual citizen and the States against the encroachments of Federal power.[1] The second and third groups, if a single amendment can be properly called a group (viz. amendments xi. and xii.) are corrections of minor defects which had disclosed themselves in the working of the Constitution.[2] The fourth group is the only one which marked a political crisis and registered a political victory. It comprises three amendments (xiii. xiv. xv.) which forbid slavery, define citizenship, secure the suffrage of citizens against attempts by States to discriminate to the injury of particular classes, and extend Federal protection to those citizens who may suffer from the operation of certain kinds of unjust State laws. These three amendments are the outcome of the War of Secession, and were needed in order to confirm and secure for the future its results. The requisite majority of States was obtained under conditions altogether abnormal, some of the lately conquered States ratifying while actually controlled by the northern armies, others as the price which they were obliged to pay for the re-admission to Congress of their senators and representatives.[3] The

[1] These ten amendments were proposed by the first Congress, having been framed by it out of 103 amendments suggested by various States, and were ratified by all the States but three. They took effect in December 1791.

[2] The eleventh amendment negatived a construction which the Supreme court had put upon its own judicial powers (see above, p. 315); the twelfth corrected a fault in the method of choosing the President.

[3] The thirteenth amendment was proposed by Congress in February 1865, ratified and declared in force December 1865; the fourteenth was proposed by Congress June 1866, ratified and declared in force July 1868; the fifteenth was proposed by Congress February 1869, ratified

details belong to history: all we need here note is that these deep-reaching, but under the circumstances perhaps unavoidable, changes were carried through not by the free will of the peoples of three-fourths of the States, but under the pressure of a majority which had triumphed in a great war, and used its command of the military strength and Federal government of the Union to effect purposes deemed indispensable to the reconstruction of the Federal system.[1]

Many amendments to the Constitution have been at various times suggested to Congress by Presidents, or brought forward in Congress by members, but very few of these have ever obtained the requisite two-thirds vote of both Houses. In 1789, however, and again in 1807, amendments were passed by Congress

and declared in force March 1870. The fourteenth amendment had given the States a strong motive for enfranchising the negroes by cutting down the representation in Congress of any State which excluded male inhabitants (being citizens of the United States) from the suffrage; the fifteenth went further and forbade "race, colour, or previous condition of servitude," to be made a ground of exclusion. The grounds for this bold step were succinctly set forth by Senator Willey (of West Virginia) when he said that the suffrage was the only sure guarantee the negro could have in many parts of the country for the enjoyment of his civil rights; that it would be a safer shield than law, and that it was required by the demands of justice, the principles of human liberty, and the spirit of Christian civilization.

The effect of these three amendments was elaborately considered by the Supreme court (in 1872) in the so-called Slaughter-house Cases (16 Wall. 82), the effect of which is thus stated by Mr. Justice Miller: "With the exception of the specific provisions in the three amendments for the protection of the personal rights of the citizens and people of the United States, and the necessary restrictions upon the power of the States for that purpose, with the additions to the power of the general government to enforce those provisions, no substantial change has been made in the relations of the State governments to the Federal government."—Address delivered before the University of Michigan, June 1887.

[1] But though military coercion influenced the adoption of the thirteenth amendment, while political coercion bore a large part in securing the adoption of the others, it must be remembered that some changes in the Constitution were an absolutely necessary corollary to the war which had just ended.

and submitted to the States for which the requisite majority of three-fourths of the States was not obtained; and in February and March 1861 an amendment forbidding the Constitution to be ever so amended as to authorize Congress to interfere with the "domestic institutions," including slavery, of any State, was passed in both Houses, but never submitted to the States, because war broke out immediately afterwards. It would doubtless, had peace been preserved, have failed to obtain the acceptance of three-fourths of the States, and its effect could only have been to require those who might thereafter propose to amend the Constitution so as to deal with slavery, to propose also the repeal of this particular amendment itself.[1]

The moral of these facts is not far to seek. Although it has long been the habit of the Americans to talk of their Constitution with almost superstitious reverence, there have often been times when leading statesmen, perhaps even political parties, would have materially altered it if they could have done so. There have, moreover, been some alterations suggested in it, which the impartial good sense of the wise would have approved, but which have never been submitted to the States, because it was known they could not

[1] The Greek republics of antiquity sometimes placed some particular law under a special sanction by denouncing the penalty of death on any one who should propose to repeal it. In such cases, the man who intended to repeal the law so sanctioned of course began by proposing the repeal of the law which imposed the penalty. So it would have been in this case: so it must always be. No sovereign body can limit its own powers. The British Parliament seems to have attempted to bind itself by providing in the Act of Union with Ireland (39 and 40 George III., c. 67) that the maintenance of the Protestant Episcopal Church as an Established Church in Ireland should be "deemed an essential and fundamental part of the Union." That Church was, however, disestablished in 1869 with as much ease as though this provision had never existed.

be carried by the requisite majority.[1] If, therefore, comparatively little use has been made of the provisions for amendment, this has been due, not solely to the excellence of the original instrument, but also to the difficulties which surround the process of change. Alterations, though perhaps not large alterations, have been needed, to cure admitted faults or to supply dangerous omissions, but the process has been so difficult that it has never been successfully applied, except either to matters of minor consequence involving no party interests (Amendments xi. and xii.), or in the course of a revolutionary movement which had dislocated the Union itself (Amendments xiii. xiv. xv.)

Why then has the regular procedure for amendment proved in practice so hard to apply?

Partly, of course, owing to the inherent disputatiousness and perversity (what the Americans call "cussedness") of bodies of men. It is difficult to get two-thirds of two assemblies (the Houses of Congress) and three-fourths of thirty-eight commonwealths, each of which acts by two assemblies, for the State legislatures

[1] In the Forty-ninth Congress (1884-86) no fewer than forty-seven propositions were introduced for the amendment of the Constitution, some of them of a sweeping, several of a rather complex, nature. (Some of these covered the same ground, so the total number of alterations proposed was less than forty-seven.) None seems to have been voted on by Congress; and only five or six even deserved serious consideration. One at least, that enabling the President to veto items in an appropriation bill, would, in the opinion of most judicious statesmen, have effected a great improvement. I find among them the following proposals: To prohibit the sale of alcoholic liquors, to forbid polygamy, to confer the suffrage on women, to vest the election of the President directly in the people, to elect representatives for three instead of two years, to choose senators by popular election, to empower Congress to limit the hours of labour, to empower Congress to pass uniform laws regarding marriage and divorce, to enable the people to elect certain Federal officers, to forbid Congress to pass any local private or special enactment, to forbid Congress to direct the payment of claims legally barred by lapse of time, to forbid the States to hire out the labour of prisoners.

are all double-chambered, to agree to the same practical proposition. Except under the pressure of urgent troubles, such as were those which procured the acceptance of the Constitution itself in 1788, few persons or bodies will consent to forego objections of detail, perhaps in themselves reasonable, for the mere sake of agreeing to what others have accepted. They want to have what seems to themselves the very best, instead of a second best suggested by some one else. Now, bodies enjoying so much legal independence as do the legislatures of the States, far from being disposed to defer to Congress or to one another, are more jealous, more suspicious, more vain and opinionated, than so many individuals. Nothing but a violent party spirit, seeking either a common party object or individual gain to flow from party success, makes them work together.

If an amendment comes to the legislatures recommended by the general voice of their party, they will be quick to adopt it. But in that case it will encounter the hostility of the opposite party, and parties are in most of the Northern States usually pretty evenly balanced. It is seldom that a two-thirds majority in either House of Congress can be secured on a party issue; and of course such majorities in both Houses, and a three-fourths majority of State legislatures on a party issue, are still less probable. Now, in a country pervaded by the spirit of party, most questions either are at starting, or soon become, controversial. A change in the Constitution, however useful its ultimate consequences, is likely to be for the moment deemed more advantageous to one party than to the other, and this is enough to make the other party oppose it. Indeed, the mere fact that a proposal comes from one side, rouses the suspicion of the other.

There is always that dilemma of which England has so often felt the evil consequences. If a measure of reform is immediately pressing, it becomes matter of party contention, it excites temper and passion. If it is not pressing, neither party, having other and nearer aims, cares to take it up and push it through.[1] In America, a party amendment to the Constitution can very seldom be carried. A non-party amendment falls into the category of those things which, because they are everybody's business, are the business of nobody.

It is evident when one considers the nature of a Rigid or Supreme constitution, that some method of altering it so as to make it conform to altered facts and ideas is indispensable. A European critic may remark that the American method has failed to answer the expectations formed of it. The belief, he will say, of its authors was that while nothing less than a pretty general agreement would justify alteration, that agreement would exist when obvious omissions preventing its smooth working were discovered. But this has not come to pass. There have been long and fierce controversies over the construction of several points in the Constitution, over the right of Congress to spend money on internal improvements, to charter a national bank, to impose a protective tariff, above all, over the treatment of slavery in the Territories. But the method of amendment was not applied to any of these questions, because no general agreement could be reached upon

[1] In England, during many years, thinking men of both parties have been convinced that something ought to be done to re-construct the Upper Chamber, but since neither party had any direct gain to expect from such a reform, neither has troubled itself to undertake a confessedly difficult task. Yet in England changes in the Constitution are effected by the comparatively simple method of a statute.

them, or indeed upon any but quite secondary matters. So the struggle over the interpretation of a document which it was found impossible to amend, passed from the law courts to the battle-field. Americans reply to such criticisms by observing that the power of amending the Constitution is one which cannot prudently be employed to conclude current political controversies, that if it were so used no constitution could be either rigid or reasonably permanent, that some latitude of construction is desirable, and that in the above-mentioned cases amendments excluding absolutely one or other of the constructions contended for would either have tied down the legislature too tightly or have hastened a probably inevitable conflict.

Ought the process of change to be made easier? say by requiring only a bare majority in Congress, and a two-thirds majority of States? American statesmen think not. A swift and easy method would not only weaken the sense of security which the rigid Constitution now gives, but would increase the troubles of current politics by stimulating a majority in Congress to frequently submit amendments to the States. The habit of mending would turn into the habit of tinkering. There would be too little distinction between changes in the ordinary statute law, which require the agreement of majorities in the two Houses and the President, and changes in the more solemnly enacted fundamental law. And the rights of the States, upon which congressional legislation cannot now directly encroach, would be endangered. The French scheme, under which an absolute majority of the two Chambers, sitting together, can amend the Constitution; or even the Swiss scheme, under which a bare majority of the voting citizens, coupled with a majority of the Cantons, can ratify constitutional

changes drafted by the Chambers, in pursuance of a previous popular vote for the revision of the Constitution,[1] is considered by the Americans dangerously lax. The idea reigns that solidity and security are the most vital attributes of a fundamental law.

From this there has followed another interesting result. Since modifications or developments are often needed, and since they can rarely be made by amendment, some other way of making them must be found. The ingenuity of lawyers has discovered one method in interpretation, while the dexterity of politicians has invented a variety of devices whereby legislation may extend, or usage may modify, the express provisions of the apparently immovable and inflexible instrument.

[1] See the Swiss Federal Constitution, Arts. 118-121.

CHAPTER XXXIII

THE INTERPRETATION OF THE CONSTITUTION

THE Constitution of England is contained in hundreds of volumes of statutes and reported cases; the Constitution of the United States (including the amendments) may be read through aloud in twenty-three minutes. It is about half as long as St. Paul's first Epistle to the Corinthians, and only one-fortieth part as long as the Irish Land Act of 1881. History knows few instruments which in so few words lay down equally momentous rules on a vast range of matters of the highest importance and complexity. The Convention of 1787 were well advised in making their draft short, because it was essential that the people should comprehend it, because fresh differences of view would have emerged the further they had gone into details, and because the more one specifies, the more one has to specify and to attempt the impossible task of providing beforehand for all contingencies. These sages were therefore content to lay down a few general rules and principles, leaving some details to be filled in by congressional legislation, and foreseeing that for others it would be necessary to trust to interpretation.

It is plain that the shorter a law is, the more general must its language be, and the greater therefore the need for interpretation. So too the greater the range of a law,

and the more numerous and serious the cases which it governs, the more frequently will its meaning be canvassed. There have been statutes dealing with private law, such as the Lex Aquilia at Rome and the Statute of Frauds in England, on which many volumes of commentaries have been written, and thousands of juristic and judicial constructions placed. Much more then must we expect to find great public and constitutional enactments subjected to the closest scrutiny in order to discover every shade of meaning which their words can be made to bear. Probably no writing except the New Testament, the Koran, the Pentateuch, and the Digest of the Emperor Justinian, has employed so much ingenuity and labour as the American Constitution, in sifting, weighing, comparing, illustrating, twisting, and torturing its text. It resembles theological writings in this, that both, while taken to be immutable guides, have to be adapted to a constantly changing world, the one to political conditions which vary from year to year and never return to their former state, the other to new phases of thought and emotion, new beliefs in the realms of physical and ethical philosophy. There must, therefore, be a development in constitutional formulas, just as there is in theological. It will come, it cannot be averted, for it comes in virtue of a law of nature: all that men can do is to shut their eyes to it, and conceal the reality of change under the continued use of time-honoured phrases, trying to persuade themselves that these phrases mean the same thing to their minds to-day as they meant generations or centuries ago. As a great living theologian says, "In a higher world it is otherwise; but here below to live is to change, and to be perfect is to have changed often."[1]

[1] Newman, *Essay on Development*, p. 39.

The Constitution of the United States is so concise and so general in its terms, that even had America been as slowly moving a country as China, many questions must have arisen on the interpretation of the fundamental law which would have modified its aspect. But America has been the most swiftly expanding of all countries. Hence the questions that have presented themselves have often related to matters which the framers of the Constitution could not have contemplated. Wiser than Justinian before them or Napoleon after them, they foresaw that their work would need to be elucidated by judicial commentary. But they were far from conjecturing the enormous strain to which some of their expressions would be subjected in the effort to apply them to new facts.

I must not venture on any general account of the interpretation of the Constitution, nor attempt to set forth the rules of construction laid down by judges and commentators, for this is a vast matter and a matter for law books. All that this chapter has to do is to indicate, very generally, in what way and with what results the Constitution has been expanded, developed, modified, by interpretation; and with that view there are three points that chiefly need discussion: (1) the authorities entitled to interpret the Constitution, (2) the main principles followed in determining whether or no the Constitution has granted certain powers, (3) the checks on possible abuses of the interpreting power.

I. To whom does it belong to interpret the Constitution? Any question arising in a legal proceeding as to the meaning and application of this fundamental law will evidently be settled by the courts of law. Every court is equally bound to pronounce and competent to pronounce on such questions, a State court no less than

a Federal court;[1] but as all the more important questions are carried by appeal to the supreme Federal court, it is practically that court whose opinion determines them.

Where the Federal courts have declared the meaning of a law, every one ought to accept and guide himself by their deliverance. But there are always questions of construction which have not been settled by the courts, some because they have not happened to arise in a law-suit, others because they are such as cannot arise in a law-suit. As regards such points, every authority, Federal or State, as well as every citizen, must be guided by the best view he or they can form of the true intent and meaning of the Constitution, taking, of course, the risk that this view may turn out to be wrong.

There are also points of construction on which every court, following a well-established practice, will refuse to decide, because they are deemed to be of "a purely political nature," a vague description, but one which could be made more specific only by an enumeration of the cases which have settled the practice. These points are accordingly left to the discretion of the executive and legislative powers, each of which forms its view as to the matters falling within its sphere, and in acting on that view is entitled to the obedience of the citizens and of the States also.[2]

It is therefore an error to suppose that the judiciary is the only interpreter of the Constitution, for a large field is left open to the other authorities of the government, whose views need not coincide, so that a dispute between those authorities, although turning on the meaning of the Constitution, may be incapable of being

[1] See Chapter XXIV. *ante.*

[2] Assuming, of course, that the matter is one which comes within the range of Federal competence.

settled by any legal proceeding. This causes no great confusion, because the decision, whether of the political or the judicial authority, is conclusive so far as regards the particular controversy or matter passed upon.

The above is the doctrine now generally accepted in America. But at one time the Presidents claimed the much wider right of being, except in questions of pure private law, generally and *prima facie* entitled to interpret the Constitution for themselves, and to act on their own interpretation, even when it ran counter to that delivered by the Supreme court. Thus Jefferson denounced the doctrine laid down in the famous judgment of Chief-Justice Marshall in the case of *Marbury* v. *Madison;*[1] thus Jackson insisted that the Supreme court was mistaken in holding that Congress had power to charter the United States bank, and that he, knowing better than the court did what the Constitution meant to permit, was entitled to attack the bank as an illegal institution, and to veto a bill proposing to re-charter it.[2] Majorities in Congress have more than once claimed for themselves the same independence. But of late years both the executive and the legislature have practically

[1] As the court dismissed upon another point in the case the proceedings against Mr. Secretary Madison, the question whether Marshall was right did not arise in a practical form.

[2] There was, however, nothing unconstitutional in the course which Jackson actually took in withdrawing the deposits from the United States Bank and in vetoing the bill for a re-charter. It is still generally admitted that a President has the right in considering a measure coming to him from Congress to form his own judgment, not only as to its expediency but as to its conformability to the Constitution. Judge Cooley observes to me: "If Jackson sincerely believed that the Constitution had been violated in the first and second charter, he was certainly not bound, when a third was proposed, to surrender his opinion in obedience to precedent. The question of approving a new charter was political; and he was entirely within the line of duty in refusing it for any reasons which, to his own mind, seemed sufficient."

receded from the position which the language formerly used seemed to assert; while, on the other hand, the judiciary, by their tendency during the whole course of their history to support every exercise of power which they did not deem plainly unconstitutional, have left a wide field to those authorities. If the latter have not used this freedom to stretch the Constitution even more than they have done, it is not solely the courts of law, but also public opinion and their own professional associations (most presidents, ministers, and congressional leaders having been lawyers) that have checked them.

II. The Constitution has been expanded by construction in two ways. Powers have been exercised, sometimes by the President, more often by the legislature, in passing statutes, and the question has arisen whether the powers so exercised were rightfully exercised, *i.e.* were really contained in the Constitution. When the question was resolved in the affirmative by the court, the power has been henceforth recognized as a part of the Constitution, although, of course, liable to be subsequently denied by a reversal of the decision which established it. This is one way. The other is where some piece of State legislation alleged to contravene the Constitution has been judicially decided to contravene it, and to be therefore invalid. The decision, in narrowing the limits of State authority, tends to widen the prohibitive authority of the Constitution, and confirms it in a range and scope of action which was previously doubtful.

Questions of the above kinds sometimes arise as questions of Interpretation in the strict sense of the term, *i.e.* as questions of the meaning of a term or phrase which is so far ambiguous that it might be taken either to cover or not to cover a case apparently contemplated

by the people when they enacted the Constitution. Sometimes they are rather questions to which we may apply the name of Construction, *i.e.* the case that has arisen is one apparently not contemplated by the enacters of the Constitution, or one which, though possibly contemplated, has for brevity's sake been omitted; but the Constitution has nevertheless to be applied to its solution. In the former case the enacting power has said something which bears, or is supposed to bear, on the matter, and the point to be determined is, what do the words mean? In the latter it has not directly referred to the matter, and the question is, Can anything be gathered from its language which covers the point that has arisen, which establishes a principle large enough to reach and include an unmentioned case, indicating what the enacting authority would have said had the matter been present to its mind, or had it thought fit to enter on an enumeration of specific instances?[1] As the Constitution is not only a well-drafted instrument with few ambiguities but also a short instru-

[1] For example, the question whether an agreement carried out between a State and an individual by a legislative act of a State is a "contract" within the meaning of the prohibition against impairing the obligation of a contract, is a question of interpretation proper, for it turns on the determination of the meaning of the term "contract." The question whether Congress had power to pass an act emancipating the slaves of persons aiding in a rebellion was a question of construction, because the case did not directly arise under any provision of the Constitution, and was apparently not contemplated by the framers thereof. It was a question which had to be solved by considering what the war powers contained in the Constitution might be taken to imply. The question whether the National government has power to issue treasury notes is also a question of construction, because, although this is a case which may possibly have been contemplated when the Constitution was enacted, it is to be determined by ascertaining whether the power "to borrow money" covers this particular method of borrowing. There is no ambiguity about the word "borrow"; the difficulty is to pronounce which out of various methods of borrowing, some of which probably were contemplated, can be properly deemed, on a review of the whole financial

ment which speaks in very general terms, mere interpretation has been far less difficult than construction.[1] It is through the latter chiefly that the Constitution has been, and still continues to be, developed and expanded. The nature of these expansions will appear from the nature of the Federal government. It is a government of delegated and specified powers. The people have entrusted to it, not the plenitude of their own authority but certain enumerated functions, and its lawful action is limited to these functions. Hence, when the Federal executive does an act, or the Federal legislature passes a law, the question arises—Is the power to do this act or pass this law one of the powers which the people have by the Constitution delegated to their agents? The power may never have been exerted before. It may not be found expressed, in so many words, in the Constitution. Nevertheless it may, upon the true construction of that instrument, taking one clause with another, be held to be therein contained.

Now the doctrines laid down by Chief-Justice Marshall, and on which the courts have constantly since proceeded, may be summed up in two propositions.

1. Every power alleged to be vested in the National government, or any organ thereof, must be affirmatively shown to have been granted. There is no presumption

attributes and functions of the National government, to be included within the borrowing power.

As to the provision restraining States from passing laws impairing the obligation of a contract, see note at the end of this volume on the case of *Dartmouth College* v. *Woodward*.

[1] It is worth remarking that as the Constitution is deemed to proceed from the People who enacted it, not from the Convention who drafted it, it is regarded for the purposes of interpretation as being the work not of a group of lawyers but of the people themselves. For a useful summary of some of the general rules of constitutional interpretation, see Patterson's *Federal Restraints on State Action*, pp. 215-217.

in favour of the existence of a power; on the contrary, the burden of proof lies on those who assert its existence, to point out something in the Constitution which, either expressly or by necessary implication, confers it. Just as an agent, claiming to act on behalf of his principal, must make out by positive evidence that his principal gave him the authority he relies on; so Congress, or those who rely on one of its statutes, are bound to show that the people have authorized the legislature to pass the statute. The search for the power will be conducted in a spirit of strict exactitude, and if there be found in the Constitution nothing which directly or impliedly conveys it, then whatever the executive or legislature of the National government, or both of them together, may have done in the persuasion of its existence, must be deemed null and void, like the act of any other unauthorized agent.[1]

2. When once the grant of a power by the people to the National government has been established, that power will be construed broadly. The strictness applied in determining its existence gives place to liberality in supporting its application. The people—so Marshall and his successors have argued—when they confer a power, must be deemed to confer a wide discretion as to the means whereby it is to be used in their service. For their main object is that it should be used vigorously and wisely, which it cannot be if the choice of methods

[1] For instance, several years ago a person summoned as a witness before a committee of the House of Representatives was imprisoned by order of the House for refusing to answer certain questions put to him. He sued the sergeant-at-arms for false imprisonment, and recovered damages, the Supreme court holding that as the Constitution could not be shown to have conferred on either House of Congress any power to punish for contempt, that power (though frequently theretofore exercised) did not exist, and the order of the House therefore constituted no defence for the sergeant's act (*Kilbourn* v. *Thompson*, 103 United States, 168).

is narrowly restricted; and while the people may well be chary in delegating powers to their agents, they must be presumed, when they do grant these powers, to grant them with confidence in the agents' judgment, allowing all that freedom in using one means or another to attain the desired end which is needed to ensure success.[1] This, which would in any case be the common-sense view, is fortified by the language of the Constitution, which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or office thereof." The sovereignty of the National government, therefore, "though limited to specified objects, is plenary as to those objects"[2] and supreme in its sphere. Congress, which cannot go one step beyond the circle of action which the Constitution has traced for it, may within that circle choose any means which it deems apt for executing its powers, and is in its choice of means subject to no review by the courts in their function of interpreters, because the people have made their representatives the sole and absolute judges of the mode in which the granted powers shall be employed. This doctrine of implied powers, and the interpretation of the words "necessary and proper," were for many years a theme of bitter and incessant controversy among American lawyers and publicists.[3] The history of the United States is in a large measure a history of the

[1] For instance, Congress having power to declare war, has power to prosecute it by all means necessary for success, and to acquire territory either by conquest or treaty. Having power to borrow money, Congress may, if it thinks fit, issue treasury notes, and may make them legal tender.

[2] See *Gibbons* v. *Ogden*, 9 Wheat. p. 1 *sqq.*, judgment of Marshall, C.J.

[3] "The powers of the government are limited, and its limits are not

arguments which sought to enlarge or restrict its import. One school of statesmen urged that a lax construction would practically leave the States at the mercy of the National government, and remove those checks on the latter which the Constitution was designed to create; while the very fact that some powers were specifically granted must be taken to import that those not specified were withheld, according to the old maxim *expressio unius exclusio alterius*, which Lord Bacon concisely explains by saying, "as exception strengthens the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated." It was replied by the opposite school that to limit the powers of the government to those expressly set forth in the Constitution would render that instrument unfit to serve the purposes of a growing and changing nation,

to be transcended. But the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consistent with the letter and spirit of the Constitution, are constitutional."—Marshall, C.-J., in *M'Culloch* v. *Maryland* (4 Wheat. 316). This is really a working-out of one of the points of Hamilton's famous argument in favour of the constitutionality of a United States bank: "Every power vested in a government is in its nature sovereign, and includes by force of the term a right to employ all the means requisite and fairly applicable to the attainment of the ends of such power, and which are not precluded by restrictions and exceptions specified in the Constitution." —*Works* (Lodge's ed.), vol. iii. p. 181.

Judge Hare sums up the matter by saying, "Congress is sovereign as regards the objects and within the limits of the Constitution. It may use all proper and suitable means for carrying the powers conferred by the Constitution into effect. The means best suited at one time may be inadequate at another; hence the need for vesting a large discretion in Congress. . . . 'Necessary and proper' are therefore, as regards legislation, nearly if not quite synonymous, that being 'necessary' which is suited to the object and calculated to attain the end in view."—*Lectures on Constitutional Law*, p. 78.

and would, by leaving men no legal means of attaining necessary but originally uncontemplated aims, provoke revolution and work the destruction of the Constitution itself.[1]

This latter contention derived much support from the fact that there were certain powers that had not been mentioned in the Constitution, but which were so obviously incident to a national government that they must be deemed to be raised by implication.[2] For instance, the only offences which Congress is expressly empowered to punish are treason, the counterfeiting of the coin or securities of the government, and piracies and other offences against the law of nations. But it was very early held that the power to declare other acts to be offences against the United States, and punish them as such, existed as a necessary appendage to various general powers. So the power to regulate commerce covered the power to punish offences obstructing commerce; the power to manage the post-office included the right to fix penalties on the theft of letters; and, in fact, a whole mass of criminal law grew up as a sanction to the civil laws which Congress had been directed to pass.

The three lines along which this development of the implied powers of the government has chiefly progressed, have been those marked out by the three express powers of taxing and borrowing money, of regulating commerce,

[1] See the philosophical remarks of Story, J., in *Martin* v. *Hunter's Lessee* (1 Wheat. p. 304 *sqq.*)

[2] Stress was also laid on the fact that whereas the Articles of Confederation of 1781 contained (Art. ii.) the expression, "Each State retains every power and jurisdiction and right not expressly delegated to the United States in Congress assembled," the Constitution merely says (Amendment x.), "The powers not granted to the United States are reserved to the States respectively or to the people," omitting the word "expressly." See the text of the Articles in the Appendix to this volume.

and of carrying on war. Each has produced a progeny of subsidiary powers, some of which have in their turn been surrounded by an unexpected offspring. Thus from the taxing and borrowing powers there sprang the powers to charter a national bank and exempt its branches and its notes from taxation by a State (a serious restriction on State authority), to create a system of custom-houses and revenue cutters, to establish a tariff for the protection of native industry. Thus the regulation of commerce has been construed to include legislation regarding every kind of transportation of goods and passengers, whether from abroad or from one State to another, regarding navigation, maritime and internal pilotage, maritime contracts, etc., together with the control of all navigable waters,[1] the construction of all public works helpful to commerce between States or with foreign countries, the power to prohibit immigration, and finally a power to establish a railway commission and control all inter-State traffic.[2] The war power proved itself even more elastic. The executive and the majority in Congress found themselves during the War of Secession obliged to stretch this power to

[1] Navigable rivers and lakes wholly within the limits of a State, and not accessible from without it, are under the authority of that State.

[2] The case of *Gibbons* v. *Ogden* supplies an interesting illustration of the way in which this doctrine of implied powers works itself out. The State of New York had, in order to reward Fulton and Livingston for their services in introducing steamboats, passed a statute giving them an exclusive right of navigating the Hudson river with steamers. A case having arisen in which this statute was invoked, it was alleged that the statute was invalid, because inconsistent with an Act passed by Congress. The question followed, Was Congress entitled to pass an Act dealing with the navigation of the Hudson? and it was held that the power to regulate commerce granted to Congress by the Constitution implied a power to legislate for navigation on such rivers as the Hudson, and that Congress having exercised that power, the action of the States on the subject was necessarily excluded. By this decision a vast field of legislation was secured to Congress and closed to the States.

cover many acts trenching on the ordinary rights of the States and of individuals, till there ensued something approaching a suspension of constitutional guarantees in favour of the central government.

The courts have occasionally gone even further afield, and have professed to deduce certain powers of the legislature from the sovereignty inherent in the National government. In its last decision on the legal tender question, a majority of the Supreme court seems to have placed upon this ground, though with special reference to the section enabling Congress to borrow money, its affirmance of that competence of Congress to declare paper money a legal tender for debts, which the earlier decision of 1871 had referred to the war power. This position evoked a controversy of wide scope, for the question what sovereignty involves is evidently at least as much a question of political as of legal science, and may be pushed to great lengths upon considerations with which law proper has little to do.

The above-mentioned instances of development have been worked out by the courts of law. But others are due to the action of the executive, or of the executive and Congress conjointly. Thus, in 1803, President Jefferson negotiated and completed the purchase of Louisiana, the whole vast possessions of France beyond the Mississippi. He believed himself to be exceeding any powers which the Constitution conferred; and desired to have an amendment to it passed, in order to validate his act. But Congress and the people did not share his scruples, and the approval of the legislature was deemed sufficient ratification for a step of transcendent importance, which no provision of the Constitution bore upon. In 1807 and 1808 Congress laid, by two statutes, an embargo on all shipping in

United States ports, thereby practically destroying the lucrative carrying trade of the New England States. Some of these States declared the Act unconstitutional, arguing that a power to regulate commerce was not a power to annihilate it, and their courts held it to be void. Congress, however, persisted for a year, and the Act, on which the Supreme court never formally pronounced, has been generally deemed within the Constitution, though Justice Story (who had warmly opposed it when he sat in Congress) remarks that it went to the extreme verge. More startling, and more far-reaching in their consequences, were the assumptions of Federal authority made during the War of Secession by the executive and confirmed, some expressly, some tacitly, by Congress and the people.[1] It was only a few of these that came before the courts, and the courts, in some instances, disapproved them. But the executive continued to exert this extraordinary authority. Appeals made to the letter of the Constitution by the minority were discredited by the fact that they were made by persons sympathizing with the Secessionists who were seeking to destroy it. So many extreme things were done under the pressure of necessity that something

[1] See Judge Cooley's *History of Michigan*, p. 353. The same eminent authority observes to me: "The President suspended the writ of *habeas corpus*. The courts held this action unconstitutional (it was subsequently confirmed by Congress), but he did not at once deem it safe to obey their judgment. Military commissioners, with the approval of the War Department and the President, condemned men to punishment for treason, but the courts released them, holding that the guaranties of liberty in the Constitution were as obligatory in war as in peace, and should be obeyed by all citizens, and all departments, and officers of government (*Milligan's case*, 4 Wall. 1). The courts held closely to the Constitution, but as happens in every civil war, a great many wrongs were done in the exercise of the war power for which no redress, or none that was adequate, could possibly be had." *Inter arma silent leges* must be always to some extent true, even under a Constitution like that of the United States.

less than these extreme things came to be accepted as a reasonable and moderate compromise.[1]

The best way to give an adequate notion of the extent to which the outlines of the Constitution have been filled up by interpretation and construction, would be to take some of its more important sections and enumerate the decisions upon them and the doctrines established by those decisions. This process would, however, be irksome to any but a legal reader, and the legal reader may do it more agreeably for himself by consulting one of the annotated editions of the Constitution.[2] He will there find that upon some provisions such as Art. i. § 8 (powers of Congress), Art. i. § 10 (powers denied to the States), Art. iii. § 2 (extent of judicial power), there has sprung up a perfect forest of judicial constructions, working out the meaning and application of the few and apparently simple words of the original document into a variety of unforeseen results. The same thing has more or less befallen nearly every section of the Constitution and of the fifteen amendments. The process shows no signs of stopping, nor can it, for the new conditions of economics and politics bring up new problems for solution. But the most important work was that done during the first half century, and especially by Chief-Justice Marshall during his long tenure of the presidency of the Supreme court (1801-1835). It is scarcely an exaggeration to call him, as an eminent American jurist has done, a second maker of the Constitution. I will not borrow the phrase which said of Augustus that he found Rome of

[1] Such as the suspension of the writ of *habeas corpus*, the emancipation of the slaves of persons aiding in rebellion, the suspension of the statute of limitations, the practical extinction of State banks by increased taxation laid on them under the general taxing power.

[2] Such as Desty's clear and compendious *Federal Constitution Annotated.*

brick and left it of marble, because Marshall's function was not to change but to develop. The Constitution was, except of course as regards the political scheme of national government, which was already well established, rather a ground plan than a city. It was, if I may pursue the metaphor, much what the site of Washington was at the beginning of this century, a symmetrical ground plan for a great city, but with only some tall edifices standing here and there among fields and woods. Marshall left it what Washington has now become, a splendid and commodious capital within whose ample bounds there are still some vacant spaces and some mean dwellings, but which, built up and beautified as it has been by the taste and wealth of its rapidly growing population, is worthy to be the centre of a mighty nation. Marshall was, of course, only one among seven judges. but his majestic intellect and the elevation of his character gave him such an ascendency, that he found himself only once in a minority on any constitutional question.[1] His work of building up and working out the Constitution was accomplished not so much by the decisions he gave as by the judgments in which he expounded the principles of these decisions, judgments which for their philosophical breadth, the luminous exactness of their reasoning, and the fine political sense which pervades them, have never been surpassed and rarely equalled by the most famous jurists of modern Europe or of ancient Rome. Marshall did not forget the duty of a judge to decide nothing more than the

[1] In that one case (*Ogden* v. *Sanders*) there was a bare majority against him, and professional opinion now approves the view which he took. See an extremely interesting address delivered to the American Bar Association in 1879 by Mr. Edward J. Phelps, who observes that when Marshall became Chief-Justice only two decisions on constitutional law had been pronounced by the court. Between that time and his death fifty-one were given.

suit before him requires, but he was wont to set forth the grounds of his decision in such a way as to show how they would fall to be applied in cases that had not yet arisen. He grasped with extraordinary force and clearness the cardinal idea that the creation of a national government implies the grant of all such subsidiary powers as are requisite to the effectuation of its main powers and purposes, but he developed and applied this idea with so much prudence and sobriety, never treading on purely political ground, never indulging the temptation to theorize, but content to follow out as a lawyer the consequences of legal principles, that the Constitution seemed not so much to rise under his hands to its full stature, as to be gradually unveiled by him till it stood revealed in the harmonious perfection of the form which its framers had designed. That admirable flexibility and capacity for growth which characterize it beyond all other rigid or supreme constitutions, is largely due to him, yet not more to his courage than to his caution.[1]

We now come to the third question: How is the interpreting authority restrained? If the American Constitution is capable of being so developed by this expansive interpretation, what security do its written terms offer to the people and to the States? What becomes of the special value claimed for Rigid constitutions that they preserve the frame of government unimpaired in its essential merits, that they restrain the excesses of a transient majority, and (in Federations) the aggressions of a central authority?

[1] Had the Supreme court been in those days possessed by the same spirit of strictness and literality which the Judicial Committee of the British Privy Council has recently applied to the construction of the British North America Act of 1867 (the Act which creates the Constitution of the Canadian Federation), the United States Constitution would never have grown to be what it now is.

The answer is two-fold. In the first place, the interpreting authority is, in questions not distinctly political, different from the legislature and from the executive. There is therefore a probability that it will disagree with either of them when they attempt to transgress the Constitution, and will decline to stretch the law so as to sanction encroachments those authorities may have attempted. The fact that the interpreting authority is nowise amenable to the other two, and is composed of lawyers, imbued with professional habits, strengthens this probability. In point of fact, there have been few cases, and those chiefly cases of urgency during the war, in which the judiciary has been even accused of lending itself to the designs of the other organs of government. The period when extensive interpretation was most active (1800-1835) was also the period when the party opposed to a strong central government commanded Congress and the executive, and so far from approving the course the court took, the dominant party then often complained of it.

In the second place, there stands above and behind the legislature, the executive, and the judiciary, another power, that of public opinion. The President, Congress, and the courts are all, the two former directly, the latter practically, amenable to the people, and anxious to be in harmony with the general current of its sentiment. If the people approve the way in which these authorities are interpreting and using the Constitution, they go on; if the people disapprove, they pause, or at least slacken their pace. Generally the people have approved of such action by the President or Congress as has seemed justified by the needs of the time, even though it may have gone beyond the letter of the Constitution: generally they have approved the conduct of the courts

whose legal interpretation has upheld such legislative or executive action. Public opinion sanctioned the purchase of Louisiana, and the still bolder action of the executive in the Secession War. It approved the Missouri compromise of 1820, which the Supreme court thirty-seven years afterwards declared to have been in excess of the powers of Congress. But it disapproved the Alien and Sedition laws of 1798, and although these statutes were never pronounced unconstitutional by the courts, this popular censure has prevented any similar legislation since that time.[1] The people have, of course, much less exact notions of the Constitution than the legal profession or the courts. But while they generally desire to see the powers of the government so far expanded as to enable it to meet the exigencies of the moment, they are sufficiently attached to its general doctrines, they sufficiently prize the protection it affords them against their own impulses, to censure any interpretation which palpably departs from the old lines. And their censure is, of course, still more severe if the court seems to be acting at the bidding of a party.

A singular result of the importance of constitutional interpretation in the American government may be here referred to. It is this, that the United States legislature has been very largely occupied in purely legal discussions. When it is proposed to legislate on a subject which has been heretofore little dealt with, the opponents of a measure have two lines of defence. They may, as Englishmen would in a like case, argue that the measure is inexpedient. But they may also, which Englishmen cannot, argue that it is unconstitutional, *i.e.* illegal, because transcending the powers of Congress.

[1] So it disapproved strongly, in the northern States, of the judgments delivered by the majority of the Supreme court in the Dred Scott case.

This is a question fit to be raised in Congress, not only as regards matters with which, as being purely political, the courts of law will refuse to interfere, but as regards all other matters also, because since a decision on the constitutionality of a statute can never be obtained from the judges by anticipation, the legislature ought to consider whether they are acting within their competence. And it is a question on which a stronger case can often be made, and made with less exertion, than on the issue whether the measure be substantially expedient. Hence it is usually put in the fore-front of the battle, and argued with great vigour and acumen by leaders who are probably more ingenious as lawyers than they are far-sighted as statesmen.

A further consequence of this habit is pointed out by one of the most thoughtful among American constitutional writers. Legal issues are apt to dwarf and obscure the more substantially important issues of principle and policy, distracting from these latter the attention of the nation as well as the skill of congressional debaters.

"The English legislature," says Judge Hare, "is free to follow any course that will promote the welfare of the State, and the inquiry is not, 'Has Parliament power to pass the Act?' but, 'Is it consistent with principle, and such as the circumstances demand?' These are the material points, and if the public mind is satisfied as to them there is no further controversy. In the United States, on the other hand, the question primarily is one of power, and in the refined and subtle discussion which ensues, right is too often lost sight of or treated as if it were synonymous with might. It is taken for granted that what the Constitution permits it also approves, and that measures which are legal cannot be contrary to morals."[1]

[1] *Lectures on Constitutional Law*, p. 135.

The interpretation of the Constitution has at times become so momentous as to furnish a basis for the formation of political parties; and the existence of parties divided upon such questions has of course stimulated the interest with which points of legal interpretation have been watched and canvassed. Soon after the formation of the National government in 1789 two parties grew up, one advocating a strong central authority, the other championing the rights of the States. Of these parties the former naturally came to insist on a liberal, an expansive, perhaps a lax construction of the words of the Constitution, because the more wide is the meaning placed upon its grant of powers, so much the wider are those powers themselves. The latter party, on the other hand, was acting in protection both of the States and of the individual citizen against the central government, when it limited by a strict and narrow interpretation of the fundamental instrument the powers which that instrument conveyed. The distinction which began in those early days has never since vanished. There has always been a party professing itself disposed to favour the central government, and therefore a party of broad construction. There has always been a party claiming that it aimed at protecting the rights of the States, and therefore a party of strict construction. Some writers have gone so far as to deem these different views of interpretation to be the foundation of all the political parties that have divided America. This view, however, inverts the facts. It is not because men have differed in their reading of the Constitution that they have advocated or opposed an extension of Federal powers; it is their attitude on this substantial issue that has determined their attitude on the verbal one. Moreover, the two great parties

have several times changed sides on the very question of interpretation. The purchase of Louisiana and the Embargo acts were the work of the Strict Constructionists, while it was the Loose Constructionist party which protested against the latter measure, and which, at the Hartford Convention of 1814, advanced doctrines of State rights almost amounting to those subsequently asserted by South Carolina in 1832 and by the Secessionists of 1861. Parties in America, as in most countries, have followed their temporary interest; and if that interest happened to differ from some traditional party doctrine, they have explained the latter away. Whenever there has been a serious party conflict, it has been in reality a conflict over some living and practical issue, and only in form a debate upon canons of legal interpretation. What is remarkable, though natural enough in a country governed by a written instrument, is that every controversy has got involved with questions of constitutional construction. When it was proposed to exert some power of Congress, as for instance to charter a national bank, to grant money for internal improvements, to enact a protective tariff, the opponents of these schemes could plausibly argue, and therefore of course did argue, that they were unconstitutional. So any suggested interference with slavery in States or Territories was immediately declared to violate the State rights which the Constitution guaranteed. Thus every serious question came to be fought as a constitutional question. But as regards most questions, and certainly as regards the great majority of the party combatants, men did not attack or defend a proposal because they held it legally unsound or sound on the true construction of the Constitution, but alleged it to be constitutionally wrong or right because they thought the welfare of the

country, or at least their party interests, to be involved. Constitutional interpretation was a pretext rather than a cause, a matter of form rather than of substance.

The results were both good and evil. They were good in so far as they made both parties profess themselves defenders of the Constitution, zealous only that it should be interpreted aright; as they familiarized the people with its provisions, and made them vigilant critics of every legislative or executive act which could affect its working. They were evil in distracting public attention from real problems to the legal aspect of those problems, and in cultivating a habit of casuistry which threatened the integrity of the Constitution itself.

Since the Civil War there has been much less of this casuistry because there have been fewer occasions for it, the Broad Construction view of the Constitution having practically prevailed—prevailed so far that the Supreme court now holds that the power of Congress to make paper money legal tender is incident to the sovereignty of the National government, and that a Democratic House of Representatives passes a bill giving a Federal commission vast powers over all the railways which pass through more than one State. There is still a party inclined to strict construction, but the strictness which it upholds would have been deemed lax by the Broad Constructionists of thirty years ago. The interpretation which has thus stretched the Constitution to cover powers once undreamt of, may be deemed a dangerous resource. But it must be remembered that even the constitutions we call rigid must make their choice between being bent or being broken. The Americans have more than once bent their Constitution in order that they might not be forced to break it.

CHAPTER XXXIV

THE DEVELOPMENT OF THE CONSTITUTION BY USAGE

THERE is yet another way in which the Constitution has been developed. This is by laying down rules on matters which are within its general scope, but have not been dealt with by its words, by the creation of machinery which it has not provided for the attainment of objects it contemplates, or, to vary the metaphor, by ploughing or planting ground which though included within the boundaries of the Constitution, was left waste and untilled by those who drew up the original instrument.

Although the Constitution is curiously minute upon some comparatively small points, such as the qualifications of members of Congress and the official record of their votes, it passes over in silence many branches of political action, many details essential to every government. Some may have been forgotten, but some were purposely omitted, because the Convention could not agree upon them, or because they would have provoked opposition in the ratifying conventions, or because they were thought unsuited to a document which it was desirable to draft concisely and to preserve as far as possible unaltered. This was wise and indeed necessary, but it threw a great responsibility upon those who had

to work the government which the Constitution created. They found nothing within the four corners of the instrument to guide them on points whose gravity was perceived as soon as they had to be settled in practice. Many of such points could not be dealt with by interpretation or construction, however liberally extensive it might be, because there was nothing in the words of the Constitution from which such construction could start, and because they were in some instances matters which, though important, could not be based upon principle, but must be settled by an arbitrary determination.

Their settlement, which began with the first Congress, has been effected in two ways, by Congressional legislation and by usage.

Congress was empowered by the Constitution to pass statutes on certain prescribed topics. On many other topics not specially named, but within its general powers, statutes were evidently needed. For instance, the whole subject of Federal taxation, direct and indirect, the establishment of Federal courts, inferior to the Supreme court, and the assignment of particular kinds and degrees of jurisdiction to each class of courts, the organization of the civil, military, and naval services of the country, the administration of Indian affairs and of the Territories, the rules to be observed in the elections of Presidents and senators, these and many other matters of high import are regulated by statutes, statutes which Congress can change as English statutes are changed by Parliament, but which, in their main features, have been but little changed since their first enactment. Although such statutes cannot be called parts of the Constitution in the same sense as the interpretations and constructions judicially placed upon it, for these latter have (subject to the

possibility of their reversal) become practically incorporated with its original text, still they have given to its working a character and direction which must be borne in mind in discussing it, and which have, in some instances, produced results opposed to the ideas of its framers. To take the latest instance, the passing of the Inter-State Commerce Act, which regulates all the greater railways over the whole United States, is an assertion of Federal authority over numerous and powerful corporations chartered by and serving the various States, which gives a new aspect and significance to the clause in the Constitution empowering Congress to regulate commerce. Legal interpretation held that clause to be sufficiently wide to enable Congress to legislate on inter-State railways; but when Congress actually exerted its power in enacting this statute a further step, and a long one, was taken towards bringing the organs of transportation under national control.[1] Legislation, therefore, though it cannot in strictness enlarge the frontiers fixed by the Constitution, can give to certain provinces lying within those frontiers far greater importance than they formerly possessed, and by so doing, can substantially change the character of the government. It cannot engender a new power, but it can turn an old one in a new direction, and call a dormant one into momentous activity.

Next as to usage. Custom, which is a law-producing agency in every department, is specially busy in matters which pertain to the practical conduct of govern-

[1] It need hardly be said that the now general recognition that the Constitution empowers Congress to deal with the subject does not imply that every detail of the Act is above objection. Although *prima facie* Congress, when competent to legislate on a subject, is free to choose its means, still it remains open to any one to challenge the constitutionality of any particular provisions in a statute.

ment. Understandings and conventions are in modern practice no less essential to the smooth working of the English Constitution, than are the principles enunciated in the Bill of Rights. Now understandings are merely long-established usages, sanctioned by no statute, often too vague to admit of precise statement,[1] yet in some instances deemed so binding that a breach of them would damage the character of a statesman or a ministry just as much as the transgression of a statute. In the United States there are fewer such understandings than in England, because under a Constitution drawn out in one fundamental document everybody is more apt to stand upon his strict legal rights, and the spirit of institutions departs less widely from their letter. Nevertheless some of those features of American government to which its character is chiefly due, and which recur most frequently in its daily working, rest neither upon the Constitution nor upon any statute, but upon usage alone. Here are some instances.

The presidential electors have by usage and by usage only lost the right the Constitution gave them of exercising their discretion in the choice of a chief magistrate.

The President is not re-elected more than once, though the Constitution places no restriction whatever on re-eligibility.[2]

[1] For instance, it is impossible to state precisely the rights of the House of Lords as to rejecting bills passed by the House of Commons. It is admitted that the Upper House must, as a matter of political necessity or prudence, in the long run yield to the Lower, but exactly how soon or under what circumstances is a matter on which no rule can be said to exist. A notion has grown up in some quarters that the House of Lords may properly resist till a general election, but must then bow to the will of the voters. But this idea, which of course receives no countenance from English law, cannot be deemed to have become established by custom as a part of the Constitution.

[2] See *ante*, Chap. V. The *Federalist* (No. lxviii.) says that the President will be and ought to be re-elected as often as the people think him worthy of their confidence.

The Senate now never exercises its undoubted power of refusing to confirm the appointments made by the President to cabinet offices.

The President is permitted to remove, without asking the consent of the Senate, officials to whose appointment the consent of the Senate is necessary. This was for a time regulated by statute, but the statute having been repealed the old usage has revived. The Constitution is silent on the point.

Both the House and the Senate conduct their legislation by means of standing committees. This vital peculiarity of the American system of government has no firmer basis than the standing orders of each House, which can be repealed at any moment, but have been maintained for many years.

The Speaker of the House is by a similar practice entrusted with the nomination of all the House committees, an arrangement which gives him an influence upon legislation greater than the President's.

The chairmen of the chief committees of both Houses, which control the great departments of State (*e.g.* foreign affairs, navy, justice, finance), have practically become an additional set of ministers for those departments.

The custom of going into caucus, by which the parties in each of the two Houses of Congress determine their action, and the obligation on individual members to obey the decision of the caucus meeting, are mere habits or understandings, without legal sanction. So is the right of the senators from a State to control the Federal patronage of that State, a right shaken (as observed in an earlier chapter) by the victory of President Garfield over Mr. Conkling, but still largely exerted. So is the usage that appropriation bills shall be first presented to the House.

The rule that a member of Congress must be chosen from the district, as well as from the State, in which he resides, rests on no Federal enactment; indeed, neither Congress nor any State legislature would be entitled thus to narrow the liberty of choice which the words of the Constitution imply, though some State legislatures have affected so to do.

Jackson introduced, and succeeding Presidents continued the practice of dismissing Federal officials belonging to the opposite party, and appointing none but adherents of their own party to the vacant places. This is the so-called Spoils System, which, having been applied also to State and municipal offices, has been made the corner-stone of "practical politics" in America. The Constitution is nowise answerable for it, and legislation only partially.

Neither in English law nor in American is there anything regarding the re-eligibility of a member of the popular chamber; nor can it be said that usage has established in either country any broad general rule on the subject. But whereas the English tendency has been to re-elect a member unless there is some positive reason for getting rid of him, in many parts of America men are disposed the other way, and refuse to re-elect him just because he has had his turn already. Any one can understand what a difference this makes in the character of the chamber.

We see, then, that several salient features of the present American government, such as the popular election of the President, the influence of senators and congressmen over patronage, the immense power of the Speaker, the Spoils system, are due to usages which have sprung up round the Constitution and profoundly affected its working, but which are not parts

of the Constitution, nor necessarily attributable to any specific provision which it contains. The most remarkable instance of all, the choice of presidential candidates by the great parties assembled in their national conventions, will be fully considered in a later chapter.

One of the changes which the last seventy years have brought about is so remarkable as to deserve special mention. The Constitution contains no provisions regarding the electoral franchise in congressional elections save the three following:—

That the franchise shall in every State be the same as that by which the members of the "most numerous branch of the State legislature" are chosen (Art. i. § 2).

That when any male citizens over twenty-one years of age are excluded by any State from the franchise (except for crime) the basis of representation in Congress of that State shall be proportionately reduced (Am. xiv., 1868).

That "the right of citizens of the United States to vote shall not be denied or abridged on account of race, colour, or previous condition of servitude" (Am. xv., 1870).

Subject to these conditions every State may regulate the electoral franchise as it pleases.

In the first days of the Constitution the suffrage was in nearly all States limited by various conditions (*e.g.* property qualification, length of residence, etc.) which excluded, or might have excluded, though in some States the proportion of very poor people was small, a considerable number of the free inhabitants. At present the suffrage is in every State practically universal. It had become so in the Free States[1] even before the war.

[1] Save that in many of them persons of colour were placed at a disadvantage.

Here is an advance towards pure democracy effected without the action of the national legislature, but solely by the legislation of the several States, a legislation which, as it may be changed at any moment, is, so far as the national government is concerned, mere custom. And of this great step, modifying profoundly the colour and character of the government, there is no trace in the words of the Constitution other than the provisions of the fourteenth and fifteenth amendments introduced for the benefit of the liberated negroes.

It is natural, it is indeed inevitable, that there should be in every country such a parasitic growth of usages and understandings round the solid legal framework of government. But must not the result of such a growth be different where a rigid constitution exists from what it is in countries where, as in England, the constitution is flexible? In England usages of the kind described become inwoven with the law of the country as settled by statutes and decisions, and modify that law. Cases come before a court in which a usage is recognized and thereby obtains a sort of legal sanction. Statutes are passed in which an existing usage is taken for granted, and which therefore harmonize with it. Thus the always changing Constitution becomes interpenetrated by custom. Custom is in fact the first stage through which a rule passes before it is embodied in binding law. But in America, where the fundamental law cannot readily be, and is in fact very rarely altered, may we not expect a conflict, or at least a want of harmony, between law and custom, due to the constant growth of the one and the immutability of the other?

In examining this point one must distinguish between subjects on which the Constitution is silent and subjects on which it speaks. As regards the former there is

little difficulty. Usage and legislation may expand the Constitution in what way they please, subject only to the control of public opinion. The courts of law will not interfere, because no provision of the Constitution is violated; and even where it may be thought that an act of Congress or of the executive is opposed to the spirit of the Constitution, still if it falls within the range of the discretion which these authorities have received, it will not be questioned by the judges.[1]

If, on the other hand, either congressional legislation or usage begins to trench on ground which the Constitution expressly covers, the question at once arises whether such legislation is valid, or whether an act done in conformity with such usage is legal. Questions of this kind do not always come before the courts, and if they do not, the presumption is in favour of whatever act has been done by Congress or by any legally constituted authority. When, however, such a question is susceptible of judicial determination and is actually brought before a tribunal, the tribunal is disposed rather to support than to treat as null the act done. Applying that expansive interpretation which has prevailed since the war as it prevailed in the days of Chief-Justice Marshall, the Supreme court is apt to find grounds for moving in the direction which it perceives public opinion to have taken, and for putting on the words of the Constitution a sense which legalizes what Congress has enacted or custom approved. When this takes place things proceed smoothly. The change which circumstances call for is made gently, and is controlled, perhaps modified, in its operation.

[1] "It is an axiom in our jurisprudence that an Act of Congress is not to be pronounced unconstitutional unless the defect of power to pass it is so clear as to admit of no doubt. Every doubt is to be resolved in favour of the validity of the law."—Swayne, J., in *U.S.* v. *Rhodes*, 1 Abb. U.S. 49.

But sometimes the courts feel bound to declare some statute, or executive act done in pursuance of usage, contrary to the Constitution. What happens? In theory the judicial determination is conclusive, and ought to check any further progress in the path which has been pronounced unconstitutional. But whether this result follows will in practice depend on the circumstances of the moment. If the case is not urgent, if there is no strong popular impulse behind Congress or the President, no paramount need for the usage which had sprung up and is now disapproved, the decision of the courts will be acquiesced in; and whatever tendency towards change exists will seek some other channel where no constitutional obstacle bars its course. But if the needs of the time be pressing, courts and Constitution may have to give way. *Salus reipublicae lex suprema.* Above that supreme written law stands the safety of the commonwealth, which will be secured, if possible in conformity with the Constitution; but if that be not possible, then by evading, or even by overriding the Constitution.[1] This is what happened in the Civil War, when men said that they would break the Constitution in order to preserve it.

Attempts to disobey the Constitution have been rare,

[1] In a remarkable letter written to Mr. Hodges (4th April 1864), President Lincoln said: "My oath to preserve the Constitution imposed on me the duty of preserving by every indispensable means that government, that nation, of which the Constitution was the organic law. Was it possible to lose the nation and yet preserve the Constitution? By general law life and limb must be protected, yet often a limb must be amputated to save a life, but a life is never wisely given to save a limb. I felt that measures, otherwise unconstitutional, might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation. Right or wrong I assumed this ground, and now avow it. I could not feel that to the best of my ability I had even tried to preserve the Constitution, if, to save slavery, or any minor matter, I should permit the wreck of government, country, and Constitution altogether."

because the fear of clashing with it has arrested many mischievous proposals in their earlier stages, while the influence of public opinion has averted possible collisions by leading the courts to lend their ultimate sanction to measures or usages which, had they come under review at their first appearance, might have been pronounced unconstitutional.[1] That collisions have been rare is good evidence of the political wisdom of American statesmen and lawyers. But politicians in other countries will err if they suppose that the existence of a rigid or supreme constitution is enough to avert collisions, or to secure the victory of the fundamental instrument.[2] A rigid constitution resembles, not some cliff of Norwegian gneiss which bears for centuries unchanged the lash of Atlantic billows, but rather a sea-wall, such as guards the seaside promenade of an English town, whose smooth surface resists the ordinary waves and currents of the Channel but may be breached or washed away by some tremendous tempest. The American Constitution has stood unbroken, because America has never seen, as some European countries have seen, angry multitudes or military tyrants bent on destroying the institutions which barred the course of their passions or ambition. And it has also stood because it has submitted to a process of constant, though sometimes scarcely perceptible, change which has adapted it to the conditions of a new age.

[1] Such as the expenditure of vast sums on "internal improvements" and the assumption of wide powers over internal communications.

[2] Judge Cooley aptly observes: "If the great men of 1787 had been living a little later they might have seen in the experience of France that the most carefully prepared and popular written constitution is not more secure than any other against sudden, violent, and destructive changes, and may, indeed, be more easily overturned by the assaults of faction than it possibly could be if its principles, having their roots deep in the nature of the people, were only expressed in unwritten usages."—Address to the South Carolina Bar Association.

The solemn determination of a people enacting a fundamental law by which they and their descendants shall be governed cannot prevent that law, however great the reverence they continue to profess for it, from being worn away in one part, enlarged in another, modified in a third, by the ceaseless action of influences playing upon the individuals who compose the people. Thus the American Constitution has necessarily changed as the nation has changed, has changed in the spirit with which men regard it, and therefore in its own spirit. To use the words of the eminent constitutional lawyer whom I have more than once quoted: "We may think," says Judge Cooley, "that we have the Constitution all before us; but for practical purposes the Constitution is that which the government, in its several departments, and the people in the performance of their duties as citizens, recognize and respect as such; and nothing else is. . . . Cervantes says: Every one is the son of his own works. This is more emphatically true of an instrument of government than it can possibly be of a natural person. What it takes to itself, though at first unwarrantable, helps to make it over into a new instrument of government, and it represents at last the acts done under it."

CHAPTER XXXV

THE RESULTS OF CONSTITUTIONAL DEVELOPMENT

We have seen that the American Constitution has changed, is changing, and by the law of its existence must continue to change, in its substance and practical working even when its words remain the same. "Time and habit," said Washington, "are at least as necessary to fix the true character of governments as of other human institutions:"[1] and while habit fixes some things, time remoulds others.

It remains to ask what has been the general result of the changes it has suffered, and what light an examination of its history, in this respect, throws upon the probable future of the instrument and on the worth of Rigid or Supreme constitutions in general.

The Constitution was avowedly created as an instrument of checks and balances. Each branch of the National government was to restrain the others, and maintain the equipoise of the whole. The legislature was to balance the executive, and the judiciary both. The two houses of the legislature were to balance one another. The National government, taking all its branches together, was balanced against the State governments. As this equilibrium was placed under the protection of a document, unchangeable save by the

[1] Farewell Address, 17th September 1796.

people themselves, no one of the branches of the National government has been able to absorb or override the others, as the House of Commons and the Cabinet, itself a child of the House of Commons, have in England overridden and subjected the Crown and the House of Lords. Each branch maintains its independence, and can, within certain limits, defy the others.

But there is among political bodies and offices (*i.e.* the persons who from time to time fill the same office) of necessity a constant strife, a struggle for existence similar to that which Mr. Darwin has shown to exist among plants and animals; and as in the case of plants and animals so also in the political sphere this struggle stimulates each body or office to exert its utmost force for its own preservation, and to develop its aptitudes in any direction wherein development is possible. Each branch of the American government has striven to extend its range and its powers; each has advanced in certain directions, but in others has been restrained by the equal or stronger pressure of other branches. I shall attempt to state the chief differences perceptible between the ideas which men entertained[1] regarding the various bodies and offices of the government when they first entered life, and the aspect they now wear to the nation.

The President has developed a capacity for becoming, in moments of national peril, something like a Roman dictator. He is in quiet times no stronger than he was at first, possibly weaker. Congress has in some respects encroached on him, yet his office has shown that it may, in the hands of a trusted leader and at the call of a sudden necessity, rise to a tremendous height.

[1] It is from these ideas that one must start in attempting such a comparison, because to endeavour to determine what the powers of each body and person really were would involve a long and difficult inquiry.

The ministers of the President have not become more important either singly or collectively as a cabinet. Cut off from the legislature on one side, and from the people on the other, they have been a mere appendage to the President.

The Senate has come to press heavily on the executive, and at the same time has developed legislative functions which, though contemplated in the Constitution, were comparatively rudimentary in the older days. It has, in the judgment of American publicists, grown relatively stronger than it then was.

The Vice-President of the United States has become even more insignificant than the Constitution seemed to make him.

On the other hand, the Speaker of the House of Representatives, whom the Constitution mentions only once, and on whom it bestows no powers, has now secured one of the leading parts in the piece, and can affect the course of legislation more than any other single person.

An oligarchy of chairmen of the leading committees has sprung up in the House of Representatives as a consequence of the increasing demands on its time and of the working of the committee system.

The Judiciary was deemed to be making large strides during the first forty years, because it established its claim to powers which, though doubtless really granted, had been but faintly apprehended in 1789. After 1830 the development of those powers advanced more slowly. But the position which the Supreme court has taken in the scheme of government, if it be not greater than the framers of the Constitution would have wished, is yet greater than they foresaw.

Although some of these changes are considerable,

they are far smaller than those which England has seen pass over her Government since 1789. So far, therefore, the rigid Constitution has maintained a sort of equilibrium between the various powers, whereas that which was then supposed to exist in England between the king, the peers, the House of Commons, and the people (*i.e.* the electors) has vanished irrecoverably.

In the other struggle that has gone on in America, that between the National government and the States, the results have been still more considerable, though the process of change has sometimes been interrupted. During the first few decades after 1789 the States, in spite of a steady and often angry resistance, sometimes backed by threats of secession, found themselves more and more entangled in the network of Federal powers which sometimes Congress, sometimes the President, sometimes the Judiciary, as the expounder of the Constitution, flung over them. Provisions of the Constitution whose bearing had been inadequately realized in the first instance were put in force against a State, and when once put in force became precedents for the future. It is instructive to observe that this was done by both of the great national parties, by those who defended State rights and preached State sovereignty as well as by the advocates of a strong central government. For the former, when they saw the opportunity of effecting by means of the central legislative or executive power an object of immediate party importance, did not hesitate to put in force that central power, forgetful or heedless of the example they were setting.

It is for this reason that the process by which the National government has grown may be called a natural one. A political force has, like a heated gas, a natural tendency to expansion, a tendency which works even

apart from the knowledge and intentions of those through whom it works. In the process of expansion such a force may meet, and may be checked or driven back by, a stronger force. The expansive force of the National government proved ultimately stronger than the force of the States, so the centralizing tendency prevailed. And it prevailed not so much by the conscious purpose of the party disposed to favour it, as through the inherent elements of strength which it possessed, and the favouring conditions amid which it acted, elements and conditions largely irrespective of either political party, and operative under the supremacy of the one as well as of the other. Now and then the centralizing process was checked. Georgia defied the Supreme court in 1830-32, and was not made to bend because the executive sided with her. South Carolina defied Congress and the President in 1832, and the issue was settled by a compromise. Acute foreign observers then and often during the period that followed predicted the dissolution of the Union. For some years before the outbreak of the Civil War the tie of obedience to the National government was palpably loosened over a large part of the country. But during and after the war the former tendency resumed its action, swifter and more potent than before.

A critic may object to the view here presented by remarking that the struggle between the National government and the States has not, as in the case of the struggles between different branches of the National government, proceeded merely by the natural development of the Constitution, but has been accelerated by specific changes in the Constitution, viz. those made by the three last amendments.

This is true. But the dominance of the centralizing

tendencies is not wholly or even mainly due to those amendments. It had begun before them. It would have come about, though less completely, without them. It has been due not only to these amendments but also—

To the extensive interpretation by the judiciary of the powers which the Constitution vests in the National government.

To the passing by Congress of statutes on topics not exclusively reserved to the States, statutes which have sensibly narrowed the field of State action.

To exertions of executive power which, having been approved by the people, and not condemned by the courts, have passed into precedents.

These have been the modes in which the centralizing tendency has shown itself and prevailed. What have been the underlying causes?

They belong to history. They are partly economical, partly moral. Steam and electricity have knit the various parts of the country closely together, have made each State and group of States more dependent on its neighbours, have added to the matters in which the whole country benefits by joint action and uniform legislation. The power of the National government to stimulate or depress commerce and industries by tariff legislation has given it a wide control over the material prosperity of part of the Union, till "the people, and especially the trading and manufacturing classes, came to look more and more to the national capital for what enlists their interests, and less and less to the capital of their own State. . . . .It is the nation and not the State that is present to the imagination of the citizens as sovereign, even in the States of Jefferson and Calhoun.

. . . The Constitution as it is, and the Union as it was, can no longer be the party watchword. There is a new Union, with new grand features, but with new engrafted evils."[1] There has grown up a pride in the national flag, and in the national government as representing national unity. In the North there is gratitude to that government as the power that saved the Union in the Civil War; in the South a sense of the strength which Congress and the President then exerted; in both a recollection of the immense scope which the war powers took and might take again. All over the country there is a great army of Federal office-holders who look to Washington as the centre of their hopes and fears. As the modes in and by which these and other similar causes can work are evidently not exhausted, it is clear that the development of the Constitution as between the nation and the States has not yet stopped, and present appearances suggest that the centralizing tendency will continue to prevail.

How does the inquiry we have been conducting affect the judgment to be passed upon the worth of rigid constitutions, *i.e.* of written instruments of government emanating from an authority superior to that of the ordinary legislature? The question is a grave one for European countries, which seem to be passing from the older or flexible to the newer or rigid type of constitutions.

A European reader who has followed the facts stated in the last foregoing chapters may be inclined to dismiss the question summarily. "Rigid Constitutions," he will say, "are on your own showing a delusion and a sham. The American Constitution has been changed, is being changed, will continue to be changed, by interpretation

[1] Cooley, *History of Michigan.*

and usage. It is not what it was even thirty years ago; who can tell what it will be thirty years hence? If its transformations are less swift than those of the English Constitution, this is only because England has not even yet so completely democratized herself as America had done half a century ago, and therefore there has been more room for change in England. If the existence of the fundamental Constitution did not prevent violent stretches of executive power during the war, and of legislative power after as well as during the war, will not its paper guarantees be trodden under foot more recklessly the next time a crisis arrives? It was intended to protect not only the States against the central government, not only each branch of the government against the other branches, but the people against themselves, that is to say, the people as a whole against the impulses of a transient majority. What becomes of this protection when you admit that even the Supreme court is influenced by public opinion, which is only another name for the reigning sentiment of the moment? If every one of the checks and safeguards contained in the document may be overset, if all taken together may be overset, where are the boasted guarantees of the fundamental law? Evidently it stands only because it is not at present assailed. It is like the walls of Jericho, tall and stately, but ready to fall at the blast of the trumpet. It is worse than a delusion: it is a snare; for it lulls the nation into a fancied security, seeming to promise a stability for the institutions of government, and a respect for the rights of the individual, which are in fact baseless. A flexible constitution like that of England is really safer, because it practises no similar deceit, but by warning good citizens that the welfare of the commonwealth depends

always on themselves and themselves only, stimulates them to constant efforts for the maintenance of their own rights and the deepest interests of society."

This statement of the case errs as much in one direction by undervaluing, as common opinion errs by overvaluing, the stability of rigid constitutions. They do not perform all that the solemnity of their wording promises. But they are not therefore useless.

To expect any form of words, however weightily conceived, with whatever sanctions enacted, permanently to restrain the passions and interests of men is to expect the impossible. Beyond a certain point, you cannot protect the people against themselves any more than you can, to use a familiar American expression, lift yourself from the ground by your own boot-straps. Laws sanctioned by the overwhelming physical power of a despot, laws sanctioned by supernatural terrors whose reality no one doubted, have failed to restrain those passions in ages of slavery and superstition. The world is not so much advanced that in this age laws, even the best and most venerable laws, will of themselves command obedience. Constitutions which in quiet times change gradually, peacefully, almost imperceptibly, must in times of revolution be changed more boldly, some provisions being sacrificed for the sake of the rest, as mariners throw overboard part of the cargo in a storm in order to save the other part with the ship herself. To cling to the letter of a Constitution when the welfare of the country for whose sake the Constitution exists is at stake, would be to seek to preserve life at the cost of all that makes life worth having—*propter vitam vivendi perdere causas.*

Nevertheless the rigid Constitution of the United States has rendered, and renders now, inestimable

services. It opposes obstacles to rash and hasty change. It secures time for deliberation. It forces the people to think seriously before they alter it or pardon a transgression of it. It makes legislatures and statesmen slow to overpass their legal powers, slow even to propose measures which the Constitution seems to disapprove. It tends to render the inevitable process of modification gradual and tentative, the result of admitted and growing necessities rather than of restless impatience. It altogether prevents some changes which a temporary majority may clamour for, but which will have ceased to be demanded before the barriers interposed by the Constitution have been overcome.[1]

It does still more than this. It forms the mind and temper of the people. It trains them to habits of legality. It strengthens their conservative instincts, their sense of the value of stability and permanence in political arrangements.[2] It makes them feel that to

[1] The sense of these services induces some thoughtful Americans to believe that it might be prudent for England to place some fundamental constitutional rules out of the reach of the ordinary methods of parliamentary change. See note to this chapter at the end of this volume.

[2] An illustration of what I mean is afforded by the history of the Roman private law. That law surpassed the laws of all other ancient States chiefly owing to the conservative temper and habits of the Roman people and the Roman lawyers. These conservative habits were largely due to the fact that early in the history of the Republic the customary law of the nation was solemnly enacted in the form of a sort of code, the so-called Law of the Twelve Tables. The existence of this code, which summed up the law in a concise and impressive form, and which had stood almost unmodified for several generations before the need of modifying it began to be felt, caused legal changes—and these necessarily became frequent when the nation had begun to extend its dominions, and to grow in commerce, wealth, and civilization—to be made in a cautious and gradual way, here a little and there a little, so that continuity was preserved, failures abandoned, the results of successful experiments secured. Thus development, while slower, became surer and better rooted in the sentiments of the people, who were themselves educated into a reverential regard for the law, and taught to abstain in practice from the imprudent exercise of that power of swift legislation which they all along possessed.

comprehend their supreme instrument of government is a personal duty, incumbent on each one of them. It familiarizes them with, it attaches them by ties of pride and reverence to, those fundamental truths on which the Constitution is based.

These are enormous services to render to any free country, but above all to one which, more than any other, is governed not by the men of rank or wealth or special wisdom, but by public opinion, that is to say, by the ideas and feelings of the people at large. In no country were swift political changes so much to be apprehended, because nowhere has material growth been so rapid and immigration so enormous. In none might the political character of the people have seemed more likely to be bold and prone to innovation, because their national existence began with a revolution, which even now lies only a century behind. That none has ripened into a more prudently conservative temper may be largely ascribed to the influence of the famous instrument of 1789, which, enacted in and for a new republic, summed up so much of what was best in the laws and customs of an ancient monarchy.

APPENDIX

NOTE TO CHAPTER III

ON CONSTITUTIONAL CONVENTIONS

In America it is always by a convention (*i.e.* a representative body called together for some occasional or temporary purpose) that a constitution is framed. It was thus that the first constitutions for the thirteen revolting colonies were drawn up and enacted in 1776 and the years following; and as early as 1780 the same plan had suggested itself as the right one for framing a constitution for the whole United States.[1] Recognized in the Federal Constitution (Art. v.) and in the successive Constitutions of the several States as the proper method to be employed when a new constitution is to be prepared, or an existing constitution revised throughout, it has now become a regular and familiar part of the machinery of American government, almost a necessary part, because all American legislatures are limited by a fundamental law, and therefore when a fundamental law is to be repealed or largely recast, it is desirable to provide for the purpose a body distinct from the ordinary legislature. Where it is sought only to change the existing fundamental law in a few specified points, the function of proposing these changes to the people for their

[1] It is found in a private letter of Alexander Hamilton (then only twenty-three years of age) of that year.

acceptance may safely be left, and generally is left, to the legislature. Originally a convention was conceived of as a sovereign body, wherein the full powers of the people were vested by popular election. It is now, however, merely an advisory body, which prepares a draft of a new constitution and submits it to the people for their acceptance or rejection. And it is not deemed to be sovereign in the sense of possessing the plenary authority of the people, for its powers may be, indeed now invariably are, limited by the statute under which the people elect it.[1]

Questions relating to the powers of a Constitutional Convention have several times come before the courts, so that there exists a small body of law as well as a large body of custom and practice regarding the rights and powers of such assemblies.[2] Into this law and practice I do not propose to enter. But it is worth while to indicate certain advantages which have been found to attach to the method of entrusting the preparation of a fundamental instrument of government to a body of men specially chosen for the purpose instead of to the ordinary legislature. The topic suggests interesting comparisons with the experience of France and other European countries in which constitutions have been drafted and enacted by the legislative, which has been sometimes also practically the executive, authority. Nor is it wholly without bearing on problems which have recently arisen in England, where Parliament has found itself, and may find itself again, invited to enact what would be in substance a new constitution for a part of the United Kingdom.

An American Constitutional Convention, being chosen for the sole purpose of drafting a constitution, and having nothing to do with the ordinary administration of government,

[1] The State Conventions which carried, or rather affected to carry, the seceding Slave States out of the Union, acted as sovereign bodies. Their proceedings, however, though clothed with legal forms, were practically revolutionary.

[2] See the learned and judicious treatise of Judge Jameson on Constitutional Conventions.

no influence or patronage, no power to raise or appropriate revenue, no opportunity of doing jobs for individuals or corporations, is not necessarily elected on party lines or in obedience to party considerations. Such considerations do affect the election, but they are not always dominant, and may sometimes be of little moment.[1] Hence men who have no claims on a party, or will not pledge themselves to a party, may be and often are elected; while men who seek to enter a legislature for the sake of party advancement or the promotion of some gainful object do not generally care to serve in a convention.

When the convention meets, it is not, like a legislature, a body strictly organized by party. A sense of individual independence and freedom may prevail unknown in legislatures. Proposals have therefore a chance of being considered on their merits. A scheme does not necessarily command the support of one set of men nor encounter the hostility of another set because it proceeds from a leader or a group belonging to a particular party. And as the ordinary party questions do not come up for decision while its deliberations are going on, men are not thrown back on their usual party affiliations, nor are their passions roused by exciting political issues.

Having no work but constitution-making to consider, a convention is free to bend its whole mind to that work. Debate has less tendency to stray off to irrelevant matters. Business advances because there are no such interruptions as a legislature charged with the ordinary business of government must expect.

Since a convention assembles for one purpose only, and that a purpose specially interesting to thoughtful and public-spirited citizens, and since its duration is short, men who would not care to enter a legislature, men pressed by

[1] It will be shown in the account of the legislatures and political parties of the States (in Vol. II. *post*) that the questions of practical importance to the States with which a State Convention would deal are very often not in issue between the two State parties, seeing that the latter are formed on national lines.

professional labours, or averse to the "rough and tumble" of politics, a class large in America and increasing in Europe, are glad to serve on it, while mere jobbers or office-seekers find little to attract them in its functions.[1]

The fact that the constitution when drafted has to be submitted to the people, by whose authority it will (if accepted) be enacted, gives to the convention a somewhat larger freedom for proposing what they think best than a legislature, courting or fearing its constituents, commonly allows itself. As the convention vanishes altogether when its work is accomplished, the ordinary motives for popularity-hunting are less potent. As it does not legislate but merely proposes, it need not fear to ask the people to enact what may offend certain persons or classes, for the odium, if any, of harassing these classes will rest with the people. And as the people must accept or reject the draft *en bloc* (unless in the rare case where provision is made for voting on particular points separately), more care is taken in preparing the draft, in seeing that it is free from errors or repugnances, than a legislature capable of repealing or altering in its next session what it now provides, is likely to bestow on the details of its measures.

Those who are familiar with European parliaments may conceive that as a set-off to these advantages there will be a difficulty in getting a number of men not organized by parties to work promptly and efficiently, that a convention will be, so to speak, an amorphous body, that if it has no leaders nor party allegiance it will divide one way to-day and another way to-morrow, that the abundance of able men will mean an abundance of doctrinaire proposals and a reluctance to sub-

[1] Many of the men conspicuous in the public life of Massachusetts during the last thirty years first made their mark in the Constitutional Convention of 1853. The draft framed by that Convention was, however, rejected by the people. The new Constitution for New York, framed by the Convention of 1867, was also lost at the polls. That Convention was remarkable as being (according to Judge Jameson) the only one in which the requirement that a delegate must be resident in the district electing him was dispensed with (*Constit. Conventions*, § 267).

ordinate individual prepossessions to practical success. Admitting that such difficulties do sometimes arise, it may be observed that in America men quickly organize themselves for any and every purpose, and that doctrinairism is there so uncommon a fault as to be almost a merit. When a complete new constitution is to be prepared, the balance of convenience is decidedly in favour of giving the work to a convention, for although conventions are sometimes unwise, they are usually composed of far abler men than those who fill the legislatures, and discharge their function with more wisdom as well as with more virtue. But where it is not desired to revise the whole frame of government, the simpler and better plan is to proceed by submitting to the people specific amendments, limited to particular provisions of the existing constitution; and this is the method now most generally employed in improving State constitutions.

The above remarks are of course chiefly based on the history of State conventions, because no national constitutional convention has sat since 1787.[1] But they apply in principle to any constitution-making body. As regards the Convention of 1787, two observations may be made before I quit the subject.

It included nearly all the best intellect and the ripest political experience that the United States then contained. John Adams was absent as Minister to England, Thomas Jefferson as Minister to France. But of the other shining lights of the time, Jay (afterwards first Chief-Justice of the Supreme Court) and John Marshall (afterwards third Chief-Justice, but not yet famous), were almost the only two who did not join in this national work. These men, great by their talents and the memory of their services, could not have been brought together for any smaller occasion, nor would any lower authority than theirs have sufficed to procure the acceptance of a plan which had so much prejudice arrayed against it.[2]

[1] All the amendments made in the Federal Constitution have been drafted by Congress. See as to these amendments, Chapter XXXII.

[2] It is remarkable that two of the strongest men in the Convention were, as

The Convention met at the most fortunate moment in American history. Between two storms there is often a perfectly still and bright day. It was in such an interval of calm that this work was carried through. Had it been attempted four years earlier or four years later, at both which times the waves of democracy were running high, it must have failed. In 1783 the people, flushed with their victory over England, were full of confidence in themselves and in liberty, persuaded that the world was at their feet, disposed to think all authority tyranny. In 1791 their fervid sympathy with the Revolution in France had not yet been damped by the excesses of the Terror nor alienated by the insolence of the French government and its diplomatic agents in America. But in 1787 the first reaction from the War of Independence had set in. Wise men had come to discern the weak side of popular government; and the people themselves were in a comparatively humble and teachable mind. Before the next wave of democratic enthusiasm swept over the country the organization of a national government under the Constitution was in all its main features complete. It was seen that liberty was still safe, and men began ere long to appreciate the larger and fuller national life which the Federal Government opened before them. History sees so many golden opportunities lost that she gladly notes those which the patriotic foresight of such men as Washington and Franklin, Hamilton and Madison and Roger Sherman seized and used.

not being native Americans, far less influenced than most of their colleagues by local and State feeling, and therefore threw the whole weight of their intellect and influence into the national scale. These were Alexander Hamilton, born a West Indian, the son of a Scotch father and French mother, and James Wilson, an immigrant from Scotland. The speeches of the latter (a lawyer in Philadelphia, and afterwards a justice of the Supreme Federal Court) in the Pennsylvania ratifying Convention, as well as in the great Convention of 1787, display an amplitude and profundity of view in matters of constitutional theory which place him in the front rank of the political thinkers of his age. Wilson, who was born about 1742 and died in 1792, is one of the luminaries of the time to whom, as to the still greater and far more brilliant Hamilton, subsequent generations of Americans have failed to do full justice.

NOTE TO CHAPTER IV

WHAT THE FEDERAL CONSTITUTION OWES TO THE CONSTITUTIONS OF THE SEVERAL STATES

THE following statement of the provisions of the Federal Constitution which have been taken from or modelled upon State constitutions, is extracted from a valuable article by Mr. Alexander Johnston in the *New Princeton Review* for September 1887 :—

"That part of the Constitution, which has attracted most notice abroad, is probably its division of Congress into a Senate and a House of Representatives, with the resulting scheme of the Senate as based on the equal representation of the States. It is probably inevitable that the upper or hereditary House in foreign legislative bodies shall disappear in time. And it is not easy to hit on any available substitute ; and English writers for example, judging from the difficulty of finding a substitute for the House of Lords, have rated too high the political skill of the Convention in hitting upon so brilliant a success as the Senate. But the success of the Convention was due to the antecedent experience of the States. Excepting Pennsylvania and Vermont, which then gave all legislative powers to one House, and executive powers to a governor and council, all the States had bicameral systems in 1787.[1]

"The name 'Senate' was used for the Upper House in Maryland, Massachusetts, New York, North Carolina, New Hampshire, and South Carolina and Virginia; and the name 'House of Representatives,' for the Lower House, was in use in Massachusetts, New Hampshire, and South Carolina, as well as in Pennsylvania and Vermont.

"The rotation, by which one-third of the Senate goes out every two years, was taken from Delaware, where one-third went out each year, New York (one-fourth each year), Pennsylvania (one-third of the council each year), and Virginia (one-fourth each year). The provisions of the whole fifth section of Art. i., the

[1] Georgia, however, had not till 1789 a true second chamber, her constitution of 1777 having merely created an executive council elected by the Assembly from among its own members.

Vermont was not one of the thirteen original States, but was a semi-independent commonwealth, not a member of the Confederation of 1781, not represented in the Convention of 1787, and not admitted to the Union till 1791.

administration of the two Houses, their power to decide the election of their members, make rules and punish their violation, keep a journal, and adjourn from day to day, are in so many State constitutions that no specification is needed for them.

"The provision that money-bills shall originate in the House of Representatives is taken almost word for word from the Constitutions of Massachusetts and New Hampshire, as is the provision, which has never been needed, that the President may adjourn the two Houses when they cannot agree on a time of adjournment. The provision for a message is from the Constitution of New York. All the details of the process of impeachment as adopted by the Convention may be found in the Constitutions of Delaware, Massachusetts, New Hampshire, New York, Pennsylvania, South Carolina, Vermont, Virginia, even to the provision in the South Carolina system that conviction should follow the vote of two-thirds of the members present. (It should be said, however, that the limitation of sentence in case of conviction to removal from office and disqualification for further office-holding is a new feature.) Even the much-praised process of the veto is taken *en bloc* from the Massachusetts Constitution of 1780, and the slight changes are so evidently introduced as improvements on the language alone as to show that the substance was copied.

"The adoption of different bases for the two Houses—the House of Representatives representing the States according to population, while the Senate represented them equally—was one of the most important pieces of work which the Convention accomplished as well as the one which it reached most unwillingly. All the States had been experimenting to find different bases for their two Houses. Virginia had come nearest to the appearance of the final result in having her Senate chosen by districts and her representatives by counties; and, as the Union already had its 'districts' formed (in the States), one might think that the Convention merely followed Virginia's experience. But the real process was far different and more circuitous. There were eleven States represented in the Convention, New Hampshire taking New York's place when the latter withdrew, and Rhode Island sending no delegates. Roughly speaking, five States wanted the 'Virginia plan' above stated; five wanted one House as in the Confederation with State equality in it; and one (Connecticut) had a plan of its own to which the other ten States finally acceded. The Connecticut system since

1699, when its legislature was divided into two Houses, had maintained the equality of the towns in the Lower House, while choosing the members of the Upper House from the whole people. In like manner its delegates now proposed that the States should be equally represented in the Senate, while the House of Representatives, chosen from the States in proportion to population, should represent the people numerically. The proposition was renewed again and again for nearly a month until the two main divisions of the Convention, unable to agree, accepted the 'Connecticut compromise,' as Bancroft calls it, and the peculiar constitution of the Senate was adopted.

"The President's office was simply a development of that of the governors of the States. The name itself had been familiar; Delaware, New Hampshire, Pennsylvania, and South Carolina, had used the title of President instead of that of Governor. In all the States the governor was commander-in-chief, except that in Rhode Island he was to have the advice of six assistants, and the major part of the freemen, before entering upon his duties. The President's pardoning power was drawn from the example of the States; they had granted it to the governors (in some cases with the advice of a council) in all the States except Connecticut, Rhode Island, and Georgia, where it was retained to the legislature, and in South Carolina, where it seems to have been forgotten in the Constitution of 1778, but was given to the governor in 1790. The governor was elected directly by the people in Connecticut, Massachusetts, New York, and Rhode Island, and indirectly by the two Houses in the other eight States; and in this nearly equal division we may, perhaps, find a reason for the Convention's hesitation to adopt either system, and for its futile attempt to introduce an electoral system, as a compromise. The power given to the Senate of ratifying or rejecting the President's appointments seems to have been an echo of New York's council of appointment; the most strenuous and persistent efforts were made to provide a council to share in appointments with the President; the admission of the Senate as a substitute was the furthest concession which the majority would make; and hardly any failure of details caused more heart-burnings than the rejection of this proposed council for appointments.

"The President's power of filling vacancies, by commissions to expire at the end of the next session of the Senate, is taken in terms from the Constitution of North Carolina.

"Almost every State prescribed a form of oath for its officers; the simple and impressive oath of the President seems to have been taken from that of Pennsylvania, with a suggestion, much improved in language, from the oath of allegiance of the same State. The office of vice-president was evidently suggested by that of the deputy, or lieutenant-governor (in four States the vice-president) of the States. The exact prototype of the office of vice-president is to be found in that of the lieutenant-governor of New York. He was to preside in the Senate, without a vote, except in case of a tie, was to succeed the governor, when succession was necessary, and was to be succeeded by the President *pro tempore* of the Senate.

"The provisions for the recognition of inter-State citizenship, and for the rendition of fugitive slaves and criminals, were a necessity in any such form of government as was contemplated, but were not at all new. They had formed a part of the eighth article of the New England Confederation of 1643. Finally the first ten amendments, which were tacitly taken as a part of the original instrument, are merely a selection from the substance or the spirit of the Bills of Rights which preceded so many of the State constitutions.

"The most solid and excellent work done by the Convention was its statement of the powers of Congress (in § 8 of Art. i.) and its definition of the sphere of the Federal judiciary (in Art. iii.) The results in both of these cases were due, like the powers denied to the States and to the United States (in §§ 9 and 10 of Art. i.), to the previous experience of government by the States alone. For eleven years or more (to say nothing of the antecedent colonial experience) the people had been engaged in their State governments in an exhaustive analysis of the powers of government. The failures in regard to some, the successes in regard to others, were all before the Convention for its consideration and guidance.

"Not creative genius, but wise and discreet selection was the proper work of the Convention; and its success was due to the clear perception of the antecedent failures and successes, and to the self-restraint of its members.

"The (presidential) electoral system was almost the only feature of the Constitution not suggested by State experience, almost the only feature which was purely artificial, not a natural growth; it was the one which met with least criticism from contemporary opponents of the Constitution and most unreserved praise from the *Federalist;* and democracy has ridden right over it."

NOTE TO CHAPTER X

EXTRACTS FROM THE RULES OF THE SENATE

A QUORUM shall consist of a majority of the senators, duly chosen and sworn.

The legislative, the executive, the confidential legislative proceedings, and the proceedings when sitting as a Court of Impeachment, shall each be recorded in a separate book.

When the yeas and nays are ordered, the names of senators shall be called alphabetically; and each senator shall, without debate, declare his assent or dissent to the question, unless excused by the Senate; and no senator shall be permitted to vote after the decision shall have been announced by the presiding officer, but may for sufficient reasons, with unanimous consent, change or withdraw his vote.

When a senator declines to vote on call of his name, he shall be required to assign his reasons therefor, and on his having assigned them, the presiding officer shall submit the question to the Senate, "Shall the senator for the reasons assigned by him, be excused from voting?" which shall be decided without debate.

Every bill and joint resolution shall receive three readings previous to its passage; which readings shall be on three different days, unless the Senate unanimously direct otherwise; and the presiding officer shall give notice at each reading whether it be the first, second, or third.

When a senator desires to speak he shall rise and address the presiding officer, and shall not proceed until he is recognised, and the presiding officer shall recognise the senator who shall first address him. No senator shall interrupt another senator in debate without his consent, and to obtain such consent he shall first address the presiding officer; and no senator shall speak more than twice upon any one question in debate on the same day, without leave of the Senate, which shall be determined without debate.

Any motion or resolution may be withdrawn or modified by the mover at any time before a decision, amendment, or ordering of the yeas and nays, except a motion to re-consider, which shall not be withdrawn without leave.

In the appointment of the standing committees, the Senate,

unless otherwise ordered, shall proceed by ballot to appoint severally the chairman of each committee, and then, by one ballot, the other members necessary to complete the same. A majority of the whole number of votes given shall be necessary to the choice of a chairman of a standing committee, but a plurality of votes shall elect the other members thereof. All other committees shall be appointed by ballot, unless otherwise ordered, and a plurality of votes shall appoint.

At the second or any subsequent session of a Congress, the legislative business which remained undetermined at the close of the next preceding session of that Congress shall be resumed and proceeded with in the same manner as if no adjournment of the Senate had taken place.

On a motion made and seconded to close the doors of the Senate, on the discussion of any business which may, in the opinion of a senator, require secrecy, the presiding officer shall direct the galleries to be cleared; and during the discussion of such motion the doors shall remain closed.

When the President of the United States shall meet the Senate in the Senate chamber for the consideration of executive business, he shall have a seat on the right of the presiding officer. When the Senate shall be convened by the President of the United States to any other place, the presiding officer of the Senate and the senators shall attend at the place appointed, with the necessary officers of the Senate.

When acting upon confidential or executive business the Senate chamber shall be cleared of all persons except the secretary, the chief clerk, the principal legislative clerk, the executive clerk, the minute and journal clerk, the sergeant-at-arms, the assistant doorkeeper, and such other officers as the presiding officer shall think necessary, and all such officers shall be sworn to secrecy.

All confidential communications made by the President of the United States to the Senate shall be by the senators and the officers of the Senate kept secret; and all treaties which may be laid before the Senate, and all remarks, votes, and proceedings thereon, shall also be kept secret until the Senate shall, by their resolution, take off the injunction of secrecy.

Any senator or officer of the Senate who shall disclose the secret or confidential business or proceedings of the Senate shall be liable, if a senator, to suffer expulsion from the body; and if an

officer, to dismissal from the service of the Senate, and to punishment for contempt.

On the final question to advise and consent to the ratification of a treaty in the form agreed to, the concurrence of two-thirds of the senators present shall be necessary to determine it in the affirmative; but all other motions and questions upon a treaty shall be decided by a majority vote, except a motion to postpone indefinitely, which shall be decided by a vote of two-thirds.

When nominations shall be made by the President of the United States to the Senate, they shall, unless otherwise ordered, be referred to appropriate committees; and the final question on every nomination shall be, "Will the Senate advise and consent to this nomination?" Which question shall not be put on the same day on which the nomination is received, nor on the day on which it may be reported by a committee, unless by unanimous consent.

All information communicated or remarks made by a senator, when acting upon nominations, concerning the character or qualifications of the person nominated, also all votes upon any nomination, shall be kept secret. If, however, charges shall be made against a person nominated, the committee may, in its discretion, notify such nominee thereof, but the name of the person making such charges shall not be disclosed. The fact that a nomination has been made, or that it has been confirmed or rejected, shall not be regarded as a secret.

NOTE (A) TO CHAPTER XVI

PRIVATE BILLS

IN England a broad distinction is drawn between public bills and local or private bills. The former class includes measures of general application, altering or adding to the general law of the land. The latter includes measures intended to apply only to some particular place or person, as for instance, bills incorporating railway or gas or water companies or extending the powers of such bodies, bills authorizing municipalities to execute public improvements, as well as estate bills, bills relating to charitable founda-

tions, and (for Ireland) divorce bills.[1] Bills of the local and personal class have for many years past been treated differently from public bills. They are brought in, as it is expressed, on petition, and not on motion. Notice is required to be given of such a bill by advertisement nearly three months before the usual date of the meeting of Parliament, and copies must be deposited some weeks before the opening of the session. The second reading is usually granted as a matter of course; and after second reading, instead of being, like a public bill, considered in committee of the whole House, it goes (if opposed) to a private bill committee consisting (usually) of four members, who take evidence regarding it from the promoters and opponents, and hear counsel argue for and against its preamble and its clauses. In fact, the proceedings on private bills are to some extent of a judicial nature, although of course the committee must have regard to considerations of policy.

Pecuniary claims against the Government are in England not raised by way of private bill. They are presented in the courts by a proceeding called a petition of right, the Crown allowing itself to be sued by one of its subjects.

In America no such difference of treatment as the above exists between public and private bills; all are dealt with in substantially the same way by the usual legislative methods. A bill of a purely local or personal nature gets its second reading as a matter of course, like a bill of general application, is similarly referred to the appropriate committee (which may hear evidence regarding it, but does not hear counsel), is considered and if necessary amended by the committee, is, if time permits, reported back to the House, and there takes its chance among the jostling crowd of other bills, Fridays, however, being specially set apart for the consideration of private business. There is a calendar of private bills, and those which get a place early upon it have a chance of passing. A great many are unopposed, and can be hurried through "by unanimous consent."

Private bills are in America even more multifarious in their contents, as well as incomparably more numerous, than in England, although they do not include the vast mass of bills for the creation

[1] The official distinction in the yearly editions of the Statutes is into Public General Acts, Public Acts of a local character (which include Provisional Order Acts), and Local Acts, and Private Acts. But in ordinary speech, those measures which are brought in at the instance of particular persons for a local purpose are called private.

or regulation of various public undertakings within a particular State, since these would fall within the province of the State legislature. They include three classes practically unknown in England, pension bills, which propose to grant a pension to some person (usually a soldier or his widow), bills for satisfying some claim of an individual against the Federal Government, and bills for dispensing in particular cases with a variety of administrative statutes. Matters which would in England be naturally left to be dealt with at the discretion of the executive are thus assumed by the legislature, which is (for reasons that will appear in later chapters) more anxious to narrow the sphere of the executive than are the ruling legislatures of European countries. I subjoin from the private bills of the session of 1880-81 some instances showing how wide is the range of congressional interference.

IN THE HOUSE OF REPRESENTATIVES.

Read twice, referred to the Committee on Invalid Pensions, and ordered to be printed.

Mr. Murch introduced the following bill :—

A BILL

For the relief of James E. Gott.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled.

That the Secretary of the Interior be, and he is hereby, Authorized and directed to increase the pension of James E. Gott, late a member of Company A, Fourteenth Regiment, Maine Volunteers, to twenty-four dollars per month.

Read twice, referred to the Committee on War Claims, and ordered to be printed.

A BILL

For the relief of the heirs of George W. Hayes.

Be it enacted, etc.

That the proper accounting officer of the Treasury be, and he is hereby, directed to pay to the heirs of George W. Hayes, of North Carolina, the sum of four hundred and fifty dollars, for three mules furnished the United States Army in eighteen hundred and sixty-four, for which they hold proper vouchers.

Read twice, referred to the Committee on Commerce, and ordered to be printed.

A BILL

To establish a fog-bell or fog-bell buoy on Graham Shoals, in the Straits of Mackinaw, and State of Michigan.

Be it enacted, etc.

That the Secretary of War be authorized and directed to establish and maintain a fog-bell or fog-bell buoy on Graham Shoals, so called, in the Straits of Mackinaw, in the State of Michigan.

Read twice, and referred to the Committee on Naval Affairs.

A BILL

For the relief of Thomas G. Corbin.

Be it enacted, etc.

That the President of the United States be, and is hereby, authorized to restore Thomas G. Corbin, now a captain on the retired list of the Navy, to the active list, and to take rank next after Commodore J. W. A. Nicholson, with restitution, from December twelfth, eighteen hundred and seventy-three, of the difference of pay between that of a commodore on the active list, on "waiting orders" pay, and that of a captain retired on half-pay, to be paid out of any money in the Treasury not otherwise appropriated.

Read twice, referred to the Committee on Ways and Means, and ordered to be printed.

Mr. Robinson introduced the following joint resolution :—

JOINT RESOLUTION

Authorizing the remission or refunding of duty on a painted-glass window from London, England, for All Souls' Church, in Washington, District of Columbia.

Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled.

That the Secretary of the Treasury be, and he is hereby, authorized and directed to remit or refund, as the case may be, the duties paid or accruing upon a painted-glass window from London, England, for All Souls' Church, in Washington, District of Columbia, imported, or to be imported into Baltimore, Maryland, or other port.

NOTE (B) TO CHAPTER XVI

THE LOBBY

"The Lobby" is the name given in America to persons, not being members of a legislature, who undertake to influence its members, and thereby to secure the passing of bills. The term includes both those who, since they hang about the chamber, and make a regular profession of working upon members, are called "lobbyists," and those persons who on any particular occasion may come up to advocate, by argument or solicitation, any particular measure in which they happen to be interested. The name, therefore, does not necessarily impute any improper motive or conduct, though it is commonly used in what Bentham calls a dyslogistic sense.

The causes which have produced lobbying are easily explained. Every legislative body has wide powers of affecting the interests and fortunes of private individuals, both for good and for evil. It entertains in every session some public bills, and of course many more private (*i.e.* local or personal) bills, which individuals are interested in supporting or resisting. Such, for instance, are public bills imposing customs duties or regulating the manufacture or sale of particular articles (*e.g.* intoxicants, explosives), and private bills establishing railroad or other companies, or granting public franchises, or (in State legislatures) altering the areas of local government, or varying the taxing or borrowing powers of municipalities. When such bills are before a legislature, the promoters and the opponents naturally seek to represent their respective views, and to enforce them upon the members with whom the decision rests. So far there is nothing wrong, for advocacy of this kind is needed in order to bring the facts fairly before the legislature.

Now both in America and in England it has been found necessary, owing to the multitude of bills and the difficulty of discussing them in a large body, to refer private bills to committees for investigation; and the legislature has in both countries formed the habit of accepting generally, though not invariably, the decisions of a committee upon the bills it has dealt with. America has, however, gone farther than England, for Congress refers all public bills as well as private bills to committees. And whereas in England private bills are dealt with by a semi-judicial procedure, the promoters and

opponents appearing by professional agents and barristers, in America no such procedure has been created, either in Congress or in the State legislatures, and private bills are handled much like public ones. Moreover, the range of private bills is wider in America than in England, in respect that they are used to obtain the satisfaction of claims by private persons against the Government, whereas in England such claims would either be brought before a law-court in the form of a Petition of Right, or, though this rarely happens, be urged upon the executive by a motion made in Parliament.

We see, therefore, that in the United States—

All business goes before committees, not only private bills but public bills, often involving great pecuniary interests.

To give a bill a fair chance of passing, the committee must be induced to report in favour of it.

The committees have no quasi-judicial rules of procedure, but inquire into and amend bills in their uncontrolled discretion, upon such evidence or other statements as they choose to admit or use.

Bills are advocated before committees by persons not belonging to any recognized and legally regulated body.

The committees, both in the State legislatures and in the Federal House of Representatives, are largely composed of new men, unused to the exercise of the powers entrusted to them.

It results from the foregoing state of facts that the efforts of the promoters and opponents of a bill will be concentrated upon the committee to which the bill has been referred; and that when the interests affected are large it will be worth while to employ every possible engine of influence. Such influence can be better applied by those who have skill and a tact matured by experience; for it is no easy matter to know how to handle a committee collectively and its members individually. Accordingly, a class of persons springs up whose profession it is to influence committees for or against bills. There is nothing necessarily illegitimate in doing so. As Mr. Spofford remarks:

"What is known as lobbying by no means implies in all cases the use of money to affect legislation. This corruption is frequently wholly absent in cases where the lobby is most industrious, numerous, persistent, and successful. A measure which it is desired to pass into law, for the benefit of certain interests represented, may be urged upon members of the legislative body in every form of

influence except the pecuniary one. By casual interviews, by informal conversation, by formal presentation of facts and arguments, by printed appeals in pamphlet form, by newspaper communications and leading articles, by personal introductions from or through men of supposed influence, by dinners, receptions, and other entertainments, by the arts of social life and the charms of feminine attraction, the public man is beset to look favourably upon the measure which interested parties seek to have enacted. It continually happens that new measures or modifications of old ones are agitated in which vast pecuniary interests are involved. The power of the law, which when faithfully administered is supreme, may make or unmake the fortunes of innumerable corporations, business firms, or individuals. Changes in the tariff duties, in the internal revenue taxes, in the banking system, in the mining statutes, in the land laws, in the extension of patents, in the increase of pensions, in the regulation of mail contracts, in the currency of the country, or proposed appropriations for steamship subsidies, for railway legislation, for war damages, and for experiments in multitudes of other fields of legislation equally or more important, come before Congress. It is inevitable that each class of interests liable to be affected should seek its own advantage in the result. When this is done legitimately, by presentation and proof of facts, by testimony, by arguments, by printed or personal appeals to the reason and sense of justice of members, there can be no objection to it."[1]

Just as a plaintiff in a lawsuit may properly employ an attorney and barrister, so a promoter may properly employ a lobbyist. But there is plainly a risk of abuse. In legal proceedings, the judge and jury are bound to take nothing into account except the law and the facts proved in evidence. It would be an obvious breach of duty should a judge decide in favour of a plaintiff because he had dined with or been importuned by him (as in the parable), or received £50 from him. The judge is surrounded by the safeguards, not only of habit but of opinion, which would condemn his conduct and cut short his career were he to yield to any private motive. The attorney and barrister are each of them also members of a recognized profession, and would forfeit its privileges were they to be detected in the attempt to employ underhand influence. No such safeguards surround either the member of a committee or the

[1] Mr. A. R. Spofford (Librarian of Congress) in *American Cyclopædia of Political Science*, Article "Lobby."

lobbyist. The former usually comes out of obscurity, and returns to it; the latter does not belong to any disciplined profession. Moreover, the questions which the committee has to decide are not questions of law, nor always questions of fact, but largely questions of policy, on which reasonable men need not agree, and as to which it is often impossible to say that there is a palpably right view or wrong view, because the determining considerations will be estimated differently by different minds.

These dangers in the system of private bill legislation made themselves so manifest in England, especially during the great era of railway construction some fifty years ago, as to have led to the adoption of the quasi-judicial procedure described in the Note on Private Bills, and to the erection of parliamentary agents into a regularly constituted profession, bound by professional rules. Public opinion has fortunately established the doctrine that each member of a private bill committee is to be considered as a semi-judicial person, whose vote neither a brother member nor any outsider must attempt to influence, but who is bound to decide, as far as he can, in a judicial spirit on the footing of the evidence tendered. Of course practice is not up to the level of theory in Parliament any more than elsewhere; still there is little solicitation to members of committees, and an almost complete absence of even the suspicion of corruption.

"In the United States," says an experienced American publicist, whose opinion I have inquired, "though lobbying is perfectly legitimate in theory, yet the secrecy and want of personal responsibility, the confusion and want of system in the committees, make it rapidly degenerate into a process of intrigue, and fall into the hands of the worst men. It is so disagreeable and humiliating that all men shrink from it, unless those who are stimulated by direct personal interest; and these soon throw away all scruples. The most dangerous men are ex-members, who know how things are to be managed."

That this unfavourable view is the prevailing one, appears not merely from what one hears in society or reads in the newspapers, though in America one must discount a great deal of what rumour asserts regarding illicit influence, but from the constitutions and statutes of some States, which endeavour to repress it.

What has been said above applies equally to Congress and to the State legislatures, and to some extent also to the municipal councils of the great cities. All legislative bodies which control

important pecuniary interests are as sure to have a lobby as an army to have its camp-followers. Where the body is, there will the vultures be gathered together. Great and wealthy States, like New York and Pennsylvania, support the largest and most active lobbies. It must, however, be remembered that although no man of good position would like to be called a lobbyist, still such men are often obliged to do the work of lobbying—*i.e.* they must dance attendance on a committee, and endeavour to influence its members for the sake of getting their measure through. They may have to do this in the interests of the good government of a city, or the reform of a charity, no less than for some private end.

The permanent professional staff of lobbyists at Washington is of course from time to time recruited by persons interested in some particular enterprise, who combine with one, two, or more professionals in trying to push it through. Thus there are at Washington, says Mr. Spofford, "pension lobbyists, tariff lobbyists, steamship subsidy lobbyists, railway lobbyists, Indian ring lobbyists, patent lobbyists, river and harbour lobbyists, mining lobbyists, bank lobbyists, mail-contract lobbyists, war damages lobbyists, back-pay and bounty lobbyists, Isthmus canal lobbyists, public building lobbyists, State claims lobbyists, cotton-tax lobbyists, and French spoliations lobbyists. Of the office-seeking lobbyists at Washington it may be said that their name is legion. There are even artist lobbyists, bent upon wheedling Congress into buying bad paintings and worse sculptures; and too frequently with success. At times in our history there has been a British lobby, with the most genteel accompaniments, devoted to watching legislation affecting the great importing and shipping interests."

A committee whose action can affect the tariff is of course an important one, and employs a large lobby.[1] I remember to have heard an anecdote of a quinine manufacturer, who had kept a lawyer as his agent to "look after" a committee during a whole session, and prevent them from touching the duty on that drug. On the last day of sitting the agent went home, thinking the danger past. As soon as he had gone, the committee suddenly recommended an alteration of the duty, on the impulse of some one who had been watching all the time for his opportunity.

[1] The phrase one often hears "there was a strong lobby" (*i.e.* for or against such and such a bill) denotes that the interests and influences represented were numerous and powerful.

Women are said to be among the most active and successful lobbyists at Washington.

Efforts have been made to check the practice of lobbying, both in Congress and in State legislatures. Statutes have been passed severely punishing any person who offers any money or value to any member with a view to influence his vote.[1] It has been repeatedly held by the courts that "contracts which have for their object to influence legislation in any other manner than by such open and public presentation of facts, arguments, and appeals to reason as are recognized as proper and legitimate with all public bodies, must be held void."[2] It has also been suggested that a regular body of attorneys, authorized to act as agents before committees of Congress, should be created. A bill for this purpose was laid before the Senate in January 1875.[3]

In many States an attempt has been made to check the evils consequent on lobbying, by restraining the legislature from passing special laws in a great variety of cases. See *post*, Chapter XL.

[1] As to Congress, see § 5450 of Revised Statutes of the United States. The provisions of State Statutes are too numerous to mention. The Constitution of California declares lobbying to be a felony; Georgia calls it a crime.

[2] Cooley, *Constit. Limit.*, p. 166. He adds, "While counsel may be properly employed to present the reasons in favour of any public measure to the body authorized to pass upon it, or to any of its committees empowered to collect facts and hear arguments, and parties interested may lawfully contract to pay for this service, yet secretly to approach the members of such a body with a view to influence their action at a time and in a manner that do not allow the presentation of opposite views, is improper and unfair to the opposing interest, and a contract to pay for this irregular and improper service would not be enforced by the law." He quotes abundant judicial authority in support of this doctrine; among others, the following observations of Justice Chapman, in *Frost* v. *Belmont*, 6 Allen, 152:—

"Though Committees properly dispense with many of the rules which regulate hearings before judicial tribunals, yet common fairness requires that neither party shall be permitted to have secret consultations and exercise secret influences that are kept from the knowledge of the other party. The business of 'lobby members' is not to go fairly and openly before the committees and present statements, proofs, and arguments, that the other side has an opportunity to meet and refute if they are wrong, but to go secretly to the members and ply them with statements and arguments that the other side cannot openly meet, however erroneous they may be, and to bring illegitimate influences to bear upon them. If the 'lobby member' is selected because of his political or personal influence, it aggravates the wrong. If his business is to unite various interests by means of projects that are called 'log-rolling,' it is still worse. The practice of procuring members of the legislature to act under the influence of what they have eaten and drunk at houses of entertainment tends to render those who yield to such influences wholly unfit to act in such cases. They are disqualified from acting fairly towards interested parties or towards the public."

[3] See an article in the *Century Magazine* for April 1886, p. 963.

NOTE TO CHAPTER XXVII

THE FEDERAL SYSTEM OF THE ENGLISH UNIVERSITIES

THE structure of the American Federation may be illustrated by a federal system familiar to many Englishmen from its existence in the two ancient universities of Oxford and Cambridge, as they stood constituted twenty years ago. The analogy, which recent legislation has rendered less perfect to-day than it was then, appears in four points.

I. Each of these universities was then for some purposes a federation of colleges. Every member of it was also a member of some college or hall;[1] as no one can be an active citizen of the United States who is not a citizen of some State. The colleges made up the university as the States make up the Union. But the university was and is something distinct from the colleges taken together. It has a sphere of its own, laws of its own, a government of its own, a revenue and budget of its own. So has each of the colleges. Each member has two patriotisms, that of his college, that of the university; just as each American citizen has his State patriotism as well as his national patriotism.

II. The university has a direct and immediate jurisdiction over every one of its members, distinct from the jurisdiction exercised by the colleges over the same persons. An offender may be punished for certain offences by a university tribunal, for certain others by a college tribunal, for some by both tribunals. So every citizen lives under the jurisdiction of the Union as well as under that of his State.

[1] By a recent statute of the University of Oxford (which I take for the sake of simplicity), reverting to its earlier constitution before the college monopoly had been established, persons have been admitted to be members who are not members of any college or hall; they are, however, treated for some purposes as collectively constituting a community similar to a college. They might be compared to United States citizens resident in the Territories, were it not that the citizen in a Territory enjoys no share in the national government, whereas the Oxford non-collegiate graduate can vote in Convocation and Congregation and for the election of members of Council.

There is of course this remarkable difference between the two cases I am comparing, that in the English universities the university is older than the colleges, whereas in America the States are older than the nation. The federal character of Oxford dates only from the time of Archbishop Laud.

III. The governing authorities of the university are created partly by the direct action of its members as graduates, partly by that of the colleges as communities. So in America Congress is created partly by the citizens as citizens, partly by the States as communities. Before the reforms of 1854 the part played by the colleges was much greater than it is now, because the Council, which is a sort of Upper House of the university legislature, consisted entirely of heads of colleges.

IV. The university has very little authority over the colleges as corporations, and indeed scarcely comes in contact with them all. Under a recent statute they are obliged to make certain contributions to the university, and to send a copy of their accounts to a university office. But they are self-governing; the university cannot interfere with their internal management, nor with the exercise of their jurisdiction over their members, which is their own and not delegated by it. So the States exercise an original and not a delegated authority over their citizens, and cannot be controlled by the National government in respect of all those numerous matters as to which the Constitution leaves them free.

NOTE (A) TO CHAPTER XXX

CONSTITUTION OF THE CONFEDERATE STATES, 1861-65

THE Constitution adopted 11th March 1861 by the Slave States which seceded from the Union and formed the short-lived Southern Confederacy, was a reproduction of the Federal Constitution of 1788-89, with certain variations, interesting because they show the points in which the States' Rights party thought the Federal Constitution defective as inadequately safeguarding the rights of the several States, and because they embody certain other changes which have often been advocated as likely to improve the working of that instrument.

The most important of these variations are the following:—

Art. i. § 2. A provision is inserted permitting the impeachment of a Federal officer acting within the limits of any State by a vote of two-thirds of the legislature thereof.

Art. i. § 6. There is added: "Congress may by law grant to the principal officer in each of the executive departments, a seat upon the

floor of either House, with the privilege of discussing any measure appertaining to his department."

Art. i. § 7. The President is permitted to veto any particular item or items in an appropriation bill.

Art. i. § 8. The imposition of protective duties and the granting of bounties on industry are forbidden, and the granting of money for internal improvements is strictly limited.

Art. i. § 9. Congress is forbidden to appropriate money from the Treasury, except by a vote of two-thirds of both Houses, unless it be asked by the head of a department and submitted by the President, or be for the payment of its own expenses, or of claims against the Confederacy declared by a judicial tribunal to be just.

Art. ii. § 1. The President and Vice-President are to be elected for six years, and the President is not to be re-eligible.

Art. ii. § 2. The President is given power to remove the highest officials at his pleasure, and others for good cause, reporting the removals to the Senate.

Art. v. The process for amending the Constitution is to be by a Convention of all the States, followed by the ratification of two-thirds of the States.

Of these changes, the third and fifth were obvious improvements; and much may be said in favour of the second and eighth. The second was a slight approximation towards the Cabinet system of England.[1]

I omit the important changes relating to slavery, which was fully protected, because these have only a historical interest.

The working of the Constitution of the Confederate States cannot be fairly judged, because it was conducted under the exigencies of a war, which necessarily gave it a despotic turn. The executive practically got its way. Congress usually sat in secret and "did little beyond register laws prepared by the executive, and debate resolutions for the vigorous conduct of the war. Outside of the ordinary powers conferred by the legislature, the war powers openly or practically exercised by the executive were more sweeping and general than those assumed by President Lincoln."—Alexander Johnston in *American Cyclopædia of Political Science*, Art. "Confederate States."

[1] A singular combination of the Presidential with the Cabinet system may be found in the present Constitution of the Hawaiian kingdom, promulgated 7th July 1887. Framed under the influence of American traditions, it keeps the Cabinet, which consists of four ministers, out of the legislature, but having an irresponsible hereditary monarch, it is obliged to give the legislature the power of dismissing them by a vote of want of confidence. The legislature consists of two sets of elective members, Nobles (unpaid), and Representatives (paid), who sit and vote together. Two successive legislatures can alter the Constitution by certain prescribed majorities: the Constitution is therefore a Rigid one.

NOTE (B) TO CHAPTER XXX

THE FEDERAL CONSTITUTION OF CANADA

THE Federal Constitution of the Dominion of Canada is contained in the British North America Act 1867, a statute of the British Parliament (30 Vict. c. 3).[1] I note a few of the many points in which it deserves to be compared with that of the United States.

The Federal or Dominion Government is conducted on the so-called "Cabinet system" of England, *i.e.* the Ministry sit in Parliament, and hold office at the pleasure of the House of Commons. The Governor-General is in the position of an irresponsible and permanent executive similar to that of the Crown in Great Britain, acting on the advice of responsible ministers. He can dissolve Parliament. The Upper House or Senate is composed of 78 persons, nominated for life by the Governor-General, *i.e.* the Ministry. The House of Commons has at present 210 members, who are elected for five years. Both senators and members receive salaries. The Senate has very little power or influence. The Governor-General has a veto but rarely exercises it, and may reserve a bill for the Queen's pleasure. The judges, not only of the Federal or Dominion Courts, but also of the Provinces, are appointed by the Crown, *i.e.* by the Dominion Ministry, and hold for good behaviour.

Each of the Provinces, at present seven in number, has a legislature of its own, which, however, consists in Ontario, British Columbia, and Manitoba, of one House only, and a Lieutenant-Governor, with a right of veto on the acts of the legislature, which he seldom exercises. Members of the Dominion Parliament cannot sit in a Provincial legislature.

The Governor-General has a right of disallowing acts of a Provincial legislature, and sometimes exerts it, especially when a legislature is deemed to have exceeded its constitutional competence.

In each of the Provinces there is a responsible Ministry, working on the Cabinet system of England.

The distribution of matters within the competence of the Dominion Parliament and of the Provincial legislatures respectively, bears a general resemblance to that existing in the United States; but there is this remarkable distinction, that whereas in the United

[1] See also 34 & 35 Vict. c. 28, and 49 & 50 Vict. c. 35.

States, Congress has only the powers actually granted to it, the State legislatures retaining all such powers as have not been taken from them, the Dominion Parliament has a general power of legislation, restricted only by the grant of certain specific and exclusive powers to the Provincial legislatures (§§ 91-95). Criminal law is reserved for the Dominion Parliament; and no province has the right to maintain a military force. Questions as to the constitutionality of a statute, whether of the Dominion Parliament or of a Provincial legislature, come before the courts in the ordinary way, and if appealed, before the Judicial Committee of the Privy Council in England.

The Constitution of the Dominion was never submitted to popular vote, and can be altered only by the British Parliament, except as regards certain points left to its own legislature. It was drafted by a sort of convention in Canada, and enacted *en bloc* by the British Parliament. There exists no power of amending the Provincial constitutions by popular vote similar to that which the peoples of the several States exercise in the United States.

NOTE TO CHAPTER XXXIII

THE DARTMOUTH COLLEGE CASE

THE famous case of *Dartmouth College* v. *Woodward* (4 Wheat. 518), decided in 1818, has been so often brought up in English discussions, that it seems proper to give a short account of it, taken from an authoritative source, an address by Mr. Justice Miller (senior justice, and one of the most eminent members, of the Supreme court), delivered before the University of Michigan, June 1887.

"It may well be doubted whether any decision ever delivered by any court has had such a pervading operation and influence in controlling legislation as this. It is founded upon the clause of the Constitution (Art. i. § 10) which declares that no State shall make any law impairing the obligation of contracts.

"Dartmouth College existed as a corporation under a charter granted by the British Crown to its trustees in New Hampshire, in the year 1769. This charter conferred upon them the entire governing power of the college, and among other powers that of

filling up all vacancies occurring in their own body, and of removing and appointing tutors. It also declared that the number of trustees should for ever consist of twelve and no more.

"After the Revolution, the legislature of New Hampshire passed a law to amend the charter, to improve and enlarge the corporation. It increased the number of trustees to twenty-one, gave the appointment of the additional members to the executive of the State, and created a board of overseers to consist of twenty-five persons, of whom twenty-one were also to be appointed by the executive of New Hampshire. These overseers had power to inspect and control the most important acts of the trustees.

"The Supreme court, reversing the decision of the Superior court of New Hampshire, held that the original charter constituted a contract between the Crown, in whom the power was then vested, and the trustees of the college, which was impaired by the act of the legislature above referred to. The opinion, to which there was but one dissent, establishes the doctrine that the act of a government, whether it be by a charter of the legislature or of the Crown, which creates a corporation, is a contract between the state and the corporation, and that all the essential franchises, powers, and benefits conferred upon the corporation by the charter become, when accepted by it, contracts within the meaning of the clause of the Constitution referred to.

"The opinion has been of late years much criticized, as including with the class of contracts whose foundation is in the legislative action of the States, many which were not properly intended to be so included by the framers of the Constitution, and it is undoubtedly true that the Supreme court itself has been compelled of late years to insist in this class of cases upon the existence of an actual contract by the state with the corporation, when relief is sought against subsequent legislation.

"The main feature of the case, namely, that a State can make a contract by legislation, as well as in any other way, and that in no such case shall a subsequent act of the legislature interpose any effectual barrier to its enforcement, where it is enforceable in the ordinary courts of justice, has remained. The result of this principle has been to make void innumerable acts of State legislatures, intended in times of disastrous financial depression and suffering to protect the people from the hardships of a rigid and prompt enforcement of the law in regard to their contracts, and to

prevent the States from repealing, abrogating, or avoiding by legislation contracts fairly entered into with other parties.

"This decision has stood from the day it was made to the present hour as a great bulwark against popular effort through State legislation to evade the payment of just debts, the performance of obligatory contracts, and the general repudiation of the rights of creditors."

As here intimated, the broad doctrine laid down in this case has been of late years considerably qualified and restricted. It has also become the practice for States making contracts by grants to which the principle of this decision could apply, to reserve power to vary or annul them, so as to leave the hands of the State free.

NOTE TO CHAPTER XXXV

The following remarks, with which I am favoured by an eminent American publicist, Mr. Seth Low, ex-mayor of Brooklyn, indicate a view which is beginning to be largely held beyond the Atlantic, and may be found interesting by English readers:—

"England, for the whole of this century, has constantly been modifying her system of government, which was largely feudal in its character, and which still retains in great part the forms of arbitrary power, in order to make it suitable for operation in conformity with modern democratic ideas. While this process has produced remarkable results, there yet remains a great deal of work of the same sort to be done before the problem of government in England will be what it is in the United States, the simple effort on the part of society as a whole to learn and to apply to itself the art of government.

"So long as England's problem continues to be largely of this character, her omnipotent Parliament will continue to prove of service to her. When, however, this process is substantially completed, so that all men in England are politically equal, and all men equally enjoy the right to take part in the government of the country, the experience of the United States would indicate that an omnipotent parliament would then be full of peril. The United States have enjoyed the measure of prosperity which they have had by trusting

completely the whole of society. But written constitutions, in the nation and in each of the States, protect at once the individual, the State, and the nation, from hasty and ill-considered action on the part of majorities as to matters fundamental. Laws may be passed by majorities, and may be removed by majorities, but majorities cannot change, in a moment, the fundamental relations of government to the people. In other words, written constitutions interpose effectual bars of delay to the passions and the prejudices of the people. The people have it in their power in the United States, as surely as in England, to change even the fundamental features of government. But they cannot do this under the impulse of a mere whim. They can do it only by prolonged and intelligent effort directed to this end through a series of years. How far those who have been the governing classes in England, with her more homogeneous population, can modify and control the passions and prejudices of the people when all come to have a vote, so that hasty action on vital matters shall never be had, is a matter upon which no American can form a judgment. To the American mind, it seems as though England's omnipotent Parliament, which has been to her so invaluable during this period of change from the feudal to the democratic ideal, may before long become an instrument full of danger to the state, unless, in some way, checks producing the same effect as those which have been found necessary in the United States, are placed upon the exercise of its omnipotence."

ARTICLES OF CONFEDERATION, 1781-1788

Articles of Confederation and Perpetual Union between the States of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia.

ARTICLE I. The style of this confederacy shall be, "The United States of America."

ART. II. Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States in Congress assembled.

ART. III. The said States hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

ART. IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively; provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant; provided, also, that no imposition, duties, or restriction, shall be laid by any State on the property of the United States, or either of them.

If any person guilty of, or charged with, treason, felony, or other high misdemeanour in any State, shall flee from justice, and be found in any of the United States, he shall, upon demand of the governor or executive power of the State from which he fled, be delivered up, and removed to the State having jurisdiction of his offence.

Full faith and credit shall be given, in each of these States, to the records, acts, and judicial proceedings of the courts and magistrates of every other State.

ART. V. For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year.

No State shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years, in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit, receives any salary, fees, or emolument of any kind.

Each State shall maintain its own delegates in any meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States, in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress; and the members of Congress shall be protected in their persons from arrests and imprisonments during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

ART. VI. No State, without the consent of the United States, in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty, with any king, prince, or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state; nor shall the United States, in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States, in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No States shall lay any imposts or duties which may interfere with any stipulations in treaties entered into by the United States, in Congress assembled, with any king, prince, or state, in pursuance of any treaties already proposed by Congress to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any State, except such number only as shall be deemed necessary by the United States, in Congress assembled, for the defence of such State or its trade;

nor shall any body of forces be kept up by any State, in time of peace, except such number only as, in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State; but every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutred, and shall provide and constantly have ready for use, in public stores, a due number of field-pieces and tents, and a proper quantity of arms, ammunition, and camp equipage.

No State shall engage in any war without the consent of the United States, in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States, in Congress assembled, can be consulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States, in Congress assembled, and then only against the kingdom or state, and the subjects thereof against which war has been so declared, and under such regulations as shall be established by the United States, in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States, in Congress assembled, shall determine otherwise.

ART. VII. When land forces are raised by any State for the common defence, all officers of or under the rank of colonel shall be appointed by the legislature of each State respectively by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

ART. VIII. All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States, in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to, or surveyed for, any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States, in Congress assembled, shall, from time to time, direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States, within the time agreed upon by the United States, in Congress assembled.

ART. IX. The United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth Article; of sending and receiving ambassadors; entering into treaties and alliances, provided that no treaty

of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever; of establishing rules for deciding, in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated; of granting letters of marque and reprisal in times of peace; appointing courts for the trial of piracies and felonies committed on the high seas; and establishing courts for receiving and determining finally appeals in all cases of captures; provided that no member of Congress shall be appointed as judge of any of the said courts.

The United States, in Congress assembled, shall also be the last resort on appeal, in all disputes and differences now subsisting, or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following: Whenever the legislative or executive authority, or lawful agent of any State in controversy with another, shall present a petition to Congress, stating the matter in question, and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question; but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as Congress shall direct, shall, in the presence of Congress, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination; and if either party shall neglect to attend at the day appointed, without showing reasons which Congress shall judge sufficient, or being present, shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court, to be appointed in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence or judgment, which shall in like manner be final and decisive; the judgment or sentence and other pro-

ceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned; provided, that every commissioner, before he sits in judgment, shall take an oath, to be administered by one of the judges of the supreme or superior court of the State where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favour, affection, or hope of reward." Provided, also, that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdictions, as they may respect such lands, and the States which passed such grants, are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall, on the petition of either party to the Congress of the United States, be finally determined, as near as may be, in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States, in Congress assembled, shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States; fixing the standard of weights and measures throughout the United States; regulating the trade and managing all affairs with the Indians not members of any of the States; provided that the legislative right of any State, within its own limits, be not infringed or violated; establishing and regulating post-offices from one State to another throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office; appointing all officers of the land forces in the service of the United States, excepting regimental officers; appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States; making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States, in Congress assembled, shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated "A Committee of the States," and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction; to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses; to borrow money or emit bills on the credit of the United States, transmitting every half year to the respective States an account of the sums of money so borrowed or

emitted; to build and equip a navy; to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State, which requisition shall be binding; and thereupon the legislature of each State shall appoint the regimental officers, raise the men, and clothe, arm, and equip them in a soldier-like manner at the expense of the United States; and the officers and men so clothed, armed, and equipped shall march to the place appointed, and within the time agreed on by the United States, in Congress assembled; but if the United States, in Congress assembled, shall, on consideration of circumstances, judge proper that any State should not raise men, or should raise a smaller number than its quota, and that any other State should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, clothed, armed, and equipped in the same manner as the quota of such State, unless the legislature of such State shall judge that such extra number can not be safely spared out of the same, in which case they shall raise, officer, clothe, arm, and equip as many of such extra number as they judge can be safely spared, and the officers and men so clothed, armed, and equipped shall march to the place appointed, and within the time agreed on by the United States, in Congress assembled.

The United States, in Congress assembled, shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defence and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander-in-chief of the army or navy, unless nine States assent to the same, nor shall a question on any other point, except for adjourning from day to day, be determined, unless by the votes of a majority of the United States, in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances, or military operations as in their judgment require secrecy; and the yeas and nays of the delegates of each State, on any question, shall be entered on the journal, when it is desired by any delegate; and the delegates of a State, or any of them, at his or their request, shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the legislatures of the several States.

ART. X. The committee of the States, or any nine of them, shall be

authorized to execute, in the recess of Congress, such of the powers of Congress as the United States, in Congress assembled, by the consent of nine States, shall, from time to time, think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the Articles of Confederation, the voice of nine States, in the Congress of the United States assembled, is requisite.

ART. XI. Canada acceding to this Confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted into the same unless such admission be agreed to by nine States.

ART. XII. All bills of credit emitted, moneys borrowed, and debts contracted by or under the authority of Congress, before the assembling of the United States, in pursuance of the present Confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States and the public faith are hereby solemnly pledged.

ART. XIII. Every State shall abide by the determinations of the United States, in Congress assembled, on all questions which by this Confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.

And whereas it hath pleased the great Governor of the world to incline the hearts of the legislatures we respectively represent in Congress to approve of, and to authorize us to ratify the said Articles of Confederation and perpetual Union, Know ye, that we, the undersigned delegates, by virtue of the power and authority to us given for that purpose, do, by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said Articles of Confederation and perpetual Union, and all and singular the matters and things therein contained. And we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States, in Congress assembled, on all questions which by the said Confederation are submitted to them; and that the Articles thereof shall be inviolably observed by the States we respectively represent, and that the Union shall be perpetual. In witness whereof we have hereunto set our hands in Congress. Done at Philadelphia, in the State of Pennsylvania, the ninth day of July, in the year of our Lord 1778, and in the third year of the Independence of America.

[These Articles were not ratified by all the States until 1st March 1781, when the delegates of Maryland, the latest in ratifying, signed for her.]

CONSTITUTION OF THE UNITED STATES

WE, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

SECTION 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.

SEC. 2. The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

No person shall be a Representative who shall not have attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

[Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.][1] The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in

[1] The clause included in brackets is amended by the XIVth Amendment, 2d section.

such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

SEC. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years; and each Senator shall have one vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

The Senate shall choose their other officers, and also a President *pro tempore*, in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

The Senate shall have sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honour, trust, or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law.

SEC. 4. The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SEC. 5. Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each house may provide.

Each house may determine the rules of its proceedings, punish its members for disorderly behaviour, and, with the concurrence of two-thirds, expel a member.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.

Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SEC. 6. The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place.

No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority

of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

SEC. 7. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevents its return, in which case it shall not be a law.

Every order, resolution, or vote to which the concurrence of the Senate and the House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SEC. 8. The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post-offices and post-roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas, and offences against the law of nations.

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

SEC. 9. The migration or importation of such persons as any

of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or *ex post facto* law shall be passed.

No capitation, or other direct tax, shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

No tax or duty shall be laid on articles exported from any State.

No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to, or from, one State be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the Treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and the expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

SEC. 10. No State shall enter into any treaty, alliance, or confederation; grant letters of marque or reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No State shall, without the consent of the Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II

SECTION 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected as follows:

Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and the House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President; but if there should remain two or more who have equal votes, the Senate shall choose from them, by ballot, the Vice-President.][1]

The Congress may determine the time of choosing the electors,

[1] This clause in brackets has been superseded by the XIIth Amendment.

and the day on which they shall give their votes; which day shall be the same throughout the United States.

No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained the age of thirty-five years, and been fourteen years a resident within the United States.

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President or Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed, or a President shall be elected.

The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

Before he enter on the execution of his office, he shall take the following oath or affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States."

SEC. 2. The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein

otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of laws, or in the heads of departments.

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SEC. 3. He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SEC. 4. The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanours.

ARTICLE III

SECTION 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

SEC. 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States—between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens, or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Courts shall have appellate jurisdiction, both as to law and fact, with such exception, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SEC. 3. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

ARTICLE IV

SECTION 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SEC. 2. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

No person held to service or labour in any State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due.

SEC. 3. New States may be admitted by the Congress into this

Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

SEC. 4. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

ARTICLE V

The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid, to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendments which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution as under the Confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in Convention by the unanimous consent of the States present,[1] the Seventeenth day of September, in the year of our Lord 1787, and of the Independence of the United States of America the Twelfth.

IN WITNESS whereof we have hereunto subscribed our names.

G° WASHINGTON,
Presidt. and Deputy from Virginia.

New Hampshire—John Langdon, Nicholas Gilman. *Massachusetts*—Nathaniel Gorham, Rufus King. *Connecticut*—Wm. Saml. Johnson, Roger Sherman. *New York*—Alexander Hamilton. *New Jersey*—Wil. Livingston, Wm. Patterson, David Brearley, Jona. Dayton. *Pennsylvania*—B. Franklin, Thos. Fitzsimons, Thomas Mifflin, Jared Ingersoll, Robt. Morris, James Wilson, Geo. Clymer, Gouv. Morris. *Delaware*—Geo. Read, Richard Bassett, Gunning Bedford, Jun., Jaco. Brown, John Dickinson. *Maryland*—James M'Henry, Dan. Carroll, Dan. Jenifer, of St. Thomas. *Virginia*—John Blair, James Madison, Jun. *North Carolina*—Wm. Blount, Hugh Williamson, Rich'd. Dobbs Speight. *South Carolina*—J. Rutledge, Charles Pinckney, Charles Cotesworth Pinckney, Pierce Butler. *Georgia*—William Few, Abr. Baldwin.

Attest: WILLIAM JACKSON, *Secretary.*

[1] Rhode Island was not represented. Several of the delegates had left the Convention before it concluded its labours, and some others who remained refused to sign. In all, 65 delegates had been appointed, 55 attended, 39 signed.

The first ratification was that of Delaware, Dec. 7, 1787; the ninth (bringing the Constitution into force) that of New Hampshire, June 21, 1788; the last, that of Rhode Island, May 29, 1790.

Articles in addition to, and amendment of, the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution.

ARTICLE I[1]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE II

A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in the time of war, but in a manner to be prescribed by law.

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty,

[1] Amendments I.-X. inclusive were proposed by Congress to the Legislatures of the States, Sept. 25, 1789, and ratified 1789-91.

or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence.

ARTICLE VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX

The enumeration of the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI[1]

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted

[1] Amendt. XI. was proposed by Congress, Sept. 5, 1794, and declared to

against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

ARTICLE XII[1]

The electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom at least shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted;—The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose

have been ratified by the legislatures of the three-fourths of the States, Jan. 8, 1798.

[1] Amendt. XII. was proposed by Congress, Dec. 12, 1803, and declared to have been ratified, Sept. 25, 1804.

shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

ARTICLE XIII[1]

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SEC. 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV[2]

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SEC. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of the State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

[1] Amendt. XIII. was proposed by Congress, Feb. 1, 1865, and declared to have been ratified by 27 of the 36 States, Dec. 18, 1865.

[2] Amendt. XIV. was proposed by Congress, June 16, 1866, and declared to been ratified by 30 of the 36 States, July 28, 1868.

SEC. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of the Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

SEC. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

SEC. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV[1]

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude.

SEC. 2. The Congress shall have power to enforce this article by appropriate legislation.

[1] Amendt. XV. was proposed by Congress, Feb. 26, 1869, and declared to have been ratified by 29 of the 37 States, March 30, 1870.

END OF VOL. I

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